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Bench Brief: Eleventh Annual Pace National Environmental Moot Court Competition

Shelley Eccleson

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MOOT COURT COMPETITION

BENCH BRIEF

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Executive Summary

This appeal involves four issues relating to the scope of the Federal Water Pollution Control Act (commonly known as the Clean Water Act (CWA)). CWA §§ 101-606, 33 U.S.C. §§ 1251-1387 (1994 & Supp. II 1996). The first issue addresses whether groundwater is "navigable water" under the CWA, 33 U.S.C. § 1362(7) and, therefore, subject to National Pollutant Discharge Elimination System (NPDES) permitting, 33 U.S.C. § 1342. The second issue addresses whether a challenge to a permit condition brought during an enforcement action is time-barred. The third issue addresses whether state or federal law should be applied when reviewing a state water quality standard requirement contained in federal permits. Finally, the fourth issue addresses whether a general condition in a permit, for compliance with state water quality standard uses, is enforceable without converting the general condition into specific limitations and requirements. This memorandum provides background information for each issue as well as arguments on both sides of the issues.

The CWA was enacted in response to the severe degradation of many of the Nation's waters. The purpose of the CWA is to restore and maintain these waters. The CWA established a permitting system to control discharges into water. The CWA prohibits the discharge of a pollutant into navigable waters without an NPDES permit. Before a permit is issued, the CWA requires that the applicant receive

certification from the state in which the affected waterbody is located. The permit must comply with specific state and federal requirements. The CWA also requires states to develop water quality standards consisting of a use for a waterbody and criteria based on that use. Effluent limitations based on these water quality standards are required to be incorporated into permits by the basic provisions of the CWA and may also be incorporated into a permit as a condition of state certification.

The focus of the instant case is on two discharges by XXX Corp. Friends of the Roaritan (FOR), a not-for-profit corporation dedicated to protecting the Roaritan River in the State of New Union, brought a citizen suit against XXX for alleged violations of the CWA. A wastepile located on XXX's property is leaching lead into the groundwater which eventually enters the Roaritan River after one mile. XXX appeals the opinion of the United States District Court for the District of New Union which held that the groundwater was "navigable water" under the CWA. Based on this determination, the court concluded that the seepage of lead into the groundwater violated the CWA.

The second discharge is from XXX's discharge pipe, for which it has a permit. The discharge contains selenium, which causes, or contributes to causing, the concentration of selenium in the Roaritan to exceed safe drinking levels established under the Safe Drinking Water Act (SDWA). Public Health Service Act (Safe Drinking Water Act (SDWA)), 42 U.S.C. §§ 300f - 300j-26 (1994 & Supp. II 1996). The permit does not contain an effluent limitation for selenium, but it generally prohibits discharges which violate a water quality standard. New Union has designated the use of the Roaritan to be for human consumption without treatment, although it does not have a criterion for selenium based on that use. FOR appeals a determination by the District Court that XXX's challenge to the permit condition prohibiting "violations of water quality standards" is ripe for review now, despite the passage of a statutory time limitation for judicial review in the CWA. FOR claims that XXX lost its opportunity to challenge the condition because it failed to challenge the

permit when issued. XXX and New Union also appeal the District Court's holding that federal law should be applied to state water quality standards and that, based on federal law, water quality standards without criteria are enforceable. XXX and New Union argue that the court erred in applying federal law rather than state law and the law of New Union clearly states that water quality standards without criteria are not enforceable. Therefore, XXX and New Union argue the discharges of selenium do not violate the CWA.

XXX claims that groundwater is not "navigable water" under the CWA. In order to support this claim, XXX relies on decisions which have specifically held that groundwater is not "navigable water." XXX also relies on the legislative history and the language of the CWA to argue that groundwater is not "navigable water." If groundwater is not "navigable water" under the CWA, then the seepage of lead from the wastepile into the groundwater is not a discharge prohibited by the CWA because the CWA only prohibits discharges into "navigable water."

FOR maintains that groundwater is tributary to "navigable water," and is itself "navigable water," because EPA's regulatory definition of "navigable water" includes tributaries thereto. Therefore, the seepage of lead from the wastepile constitutes the discharge of a pollutant into "navigable water" without a permit. Like XXX, FOR relies on the legislative history and language of the CWA to support its argument. FOR also points to decisions which have held that certain groundwater can be "navigable water." FOR notes that "tributary groundwater" has been held to be "navigable water." XXX counters that the "tributary groundwater" decision, relied upon by FOR, is irrelevant because it addressed "tributary groundwater" that was immediately adjacent to navigable-in-fact surface waters as opposed to being separated by a mile as in the instant case.

XXX argues that the challenge to the permit condition was not ripe when the permit was issued. Consequently, the issue was not ripe during the statutory time period. The challenge requires a more concrete factual context on which the court can base its decision. It is necessary to see how the

permit condition will be applied and how it will affect XXX. Therefore, XXX argues the statutory time period should not have begun to run when the permit was issued.

FOR claims that if the challenge to the permit condition was not brought during the statutory time period, the opportunity to bring it was lost. According to the CWA, any challenge which could have been brought during the statutory time-period, and was not brought, cannot be raised in an enforcement proceeding. In addition, FOR argues that the issue of whether or not a water quality standard must be reduced to numerical or other specific requirements in a permit is a purely legal issue, requiring no factual context. The issue was therefore ripe during the statutory time period. Even if XXX did not believe the issue was ripe for review during the statutory time period, XXX was required to bring the challenge during the statutory time period and await determination by the court as to whether the issue was ripe for review.

XXX and New Union argue that the issue of whether a permit requirement to comply with water quality standards, without additional criteria, is enforceable is a question of state law. As such, the holding of the Supreme Court of New Union, that water quality standards are not enforceable without criteria, is controlling. See *Prentice v. Dep't of Env'tl. Quality*, 435 N.U. 875 (1989) (hypothetical case for the Moot Court Competition). XXX and New Union claim that the issue is a question of state law because it interprets state regulations based on a state statute. The provision was incorporated into the permit as a condition of state certification. Therefore, the EPA and the citizens are bound by the state court's interpretation.

FOR, on the other hand, claims that the issue is a question of federal law. The state regulations must be approved by the EPA federalized. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). In the instant case, the permit provision is boilerplate in EPA permits. The EPA had to include the provision in the permit as a matter of federal law regardless of the certification condition. However, even if the court determines that the provision was incorporated as a condition of state certification rather than EPA initiative, state water quality

regulations are adopted in response to the CWA, and are incorporated into federal permits and enforceable through the CWA. Therefore, the court is not bound by the state court's interpretation.

XXX and New Union also maintain that the legislative history demonstrates that Congress intended CWA permits to provide certainty to permittees. Indeed, Congress stated that it was "attempting to . . . provide law that can be administered with certainty and precision." 117 Cong. Rec. 17,404 (1971). An unqualified permit condition that XXX comply with water quality standards is inconsistent with this congressional intent. In order to achieve specificity and certainty, a five-step process is followed: 1) the state designates a use; 2) criteria are established based on that use; 3) a Total Maximum Daily Load (TMDL) is determined for the particular waterbody at issue; 4) the allowable waste load for the pollutant is allocated among the polluting sources; and 5) specific effluent limitations are included in permits based on the waste load allocations. See Jeffrey Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1168 (1983). XXX and New Union argue that only the first step was completed. Without a criterion and a TMDL for selenium, a waste load allocation cannot be made between XXX and Sigma Chemical, the other (larger) discharger of selenium one mile upstream. If a waste load allocation is not reduced to an effluent limitation in a permit, XXX does not know how much selenium must be reduced in its discharge. Therefore, it is necessary to reduce water quality standards to numeric or specific effluent limitations in the permit. A permit condition to "comply with water quality standards" is nothing more than a condition to "comply with the CWA." Such a condition simply does not tell a permittee what is expected of them. If such a condition would not provide a meaningful requirement, it would not be necessary to issue permits.

FOR claims that it is not necessary to follow the five-step process to implement water quality standards. Although the five-step process may be preferable, including in the permit a condition prohibiting violations of the state water quality

standards is also a valid method. Narrative standards are routinely enforced without allocation or reduction to specific numbers. FOR relies on precedent to support its claim that water quality use designations are enforceable without applying the five-step process reducing criteria to effluent limitations. *See Jefferson County v. Washington Dep't of Ecology* [hereinafter *Jefferson County II*], 511 U.S. 700 (1994), *aff'd* 849 P.2d 646 (Wash. 1993); *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). Moreover, if the court does require criteria for selenium, the use essentially has one in the Maximum Contaminant Level (MCL) for selenium established under the SDWA.

Suggested Questions for the Judges

Sample Questions on the Groundwater Issue

Questions for FOR and New Union:

1. How can groundwater be “navigable water” when the legislative history specifically states that Congress refused to include federal standards for groundwater? *See* S. Rep. 92-414 at 73 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739.
2. If groundwater is intended to be regulated by an NPDES permitting, CWA § 402, 33 U.S.C. § 1342 (1994), why is groundwater specifically mentioned in the information and funding sections of the CWA but noticeably absent in the permitting and enforcement sections?
3. Doesn't navigability imply the use of a waterway for transportation? And isn't groundwater essentially not suitable for transportation?
4. Groundwater is used in the same sentence as “navigable water” in several sections of the CWA. *See* CWA §§ 102(a), 104(a)(5), 106(e)(1), 202(b)(2), 208(b)(2)(K), 304(f), 502(6), 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256(e)(1), 1282(b), 1288(b)(2)(K), 1314(f), 1362(6) (1994). If groundwater is “navigable water,” wouldn't this be surplusage?
5. Isn't groundwater adequately protected under other acts such as the SDWA, 42 U.S.C. §§ 300f-300j-26 (1994 & Supp. II 1996), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 4321-4370d (1994), and the Comprehensive Envi-

ronmental Response, Compensation and Liability Act, §§ 101-405, 42 U.S.C. §§ 9601 - 9675 (1994)? If the CWA covered groundwater, wouldn't those acts be redundant?

Questions for XXX:

1. Congress and the EPA have recognized tributary water as "navigable water." Therefore, shouldn't tributary groundwater be recognized as "navigable water?"
2. Considering Congress and the courts keep expanding the scope of "navigable water" beyond its traditional meaning, shouldn't "navigable water" include groundwater?
3. Shouldn't the CWA be read to the fullest extent of the Commerce Clause, Const. Art. I, § cl. 3, which would include groundwater?
4. Doesn't the authority to control injection into wells necessarily require control over groundwater since wells empty into groundwater? Since CWA Section 402(a)(1), 33 U.S.C. § 1342(a)(1) (1994), requires the Administrator to have the same authority as states under CWA Section 402(b), 33 U.S.C. 1342(b), Section 402(b) requires states to have the authority to issue permits which control the disposal of pollutants into wells, doesn't it follow that the Administrator must also have the authority to issue permits which control disposal of pollutants into wells?
5. The Administrator has authority to issue permits from point sources. Doesn't the fact that the definition of "point source" includes "wells" indicate that the administrator has control over groundwater?
6. Permits are required for discharges of pollutants into "navigable water." The definition of "pollutant" excludes injection into wells related to the production of oil and gas. Wouldn't this exception indicate that all other injections into wells are pollutants controlled by the NPDES program?

Sample Questions on the Ripeness Issue

Questions for XXX:

1. Shouldn't XXX have challenged the permit condition during the statutory time period and allowed the court to determine whether the issue was ripe?
2. Doesn't CWA Section 509, 33 U.S.C. § 1369 (1994), specifically state that judicial review must be obtained within 120 days of issuance of the permit and the only exception is when additional information develops?
3. Isn't XXX asking the court to perform a retrospective ripeness analysis, which the courts are reluctant to do?
4. Setting aside the fact that the issue is time-barred, wouldn't a court performing a ripeness analysis at the time the permit was issued refuse to defer review because to do so would cause hardship on one of the parties? In the absence of review at that time, wouldn't XXX have to comply with the water quality standards and be subject to civil and criminal penalties?

Questions for FOR and New Union:

1. How does the court benefit from a more concrete factual basis at the time of enforcement than it had at the time the permit was issued?
2. A court can only hear an issue that is ripe. If a challenge to the issuance of a permit can only be brought during the statutory time period, and the issue was not ripe during that time period, isn't the petitioner prevented from having his day in court? If the issue is unripe during the statutory time period, doesn't the statutory time period have to begin to run when the issue becomes ripe if the issue remains unripe during the statutory time period?
3. The permit prohibits the violation of water quality standards. The state may change these water quality standards from time to time. Isn't it impossible, therefore, to know which water quality standards the discharger may be subject to at the time of permit issuance? If so, how can review be ripe at that time?

4. Courts have held that similar statutory time limitations in other acts, such as the CAA, §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994), have not began to run until the issue was ripe. Shouldn't the same apply to the CWA statutory time limitation?

Sample Questions on the State or Federal Law Issue

Questions for FOR:

1. Aren't state water quality standards creations of state law and, therefore, should be interpreted by the state courts?
2. Isn't the provision in the permit as a condition of state certification of state law requirements which the Administrator is required to include in the permit under CWA Section 401, 33 U.S.C. § 1341 (1994)?
3. Hasn't the EPA determined that limitations and conditions attributable to state certification shall be made through applicable procedures of the state?

Questions for XXX and New Union:

1. Aren't water quality standards federal because they require approval from the Administrator and are only enforceable through an NPDES permits issued under federal law?
2. Isn't the provision included in the permit because: 1) the language is boilerplate language which the EPA incorporates into all its permits as a matter of federal law; and 2) CWA Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994) requires the Administrator to achieve effluent limitations which meet water quality standards as a matter of federal law? Therefore, isn't it federal law and not a requirement of state certification?
3. Hasn't the Supreme Court referred to the state water quality standards as federalized? *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).
4. Even if the court finds the state interpretation of the standards should apply rather than the federal interpretation, CWA section 510, 33 U.S.C. 1370 (1994), only preserves state law which is more stringent than federal law. In the instant case, doesn't the federal interpretation govern because the

state interpretation is less stringent than the federal interpretation?

Sample Questions on the Enforceability of Water
Quality Standards Without Criteria

Questions for FOR:

1. Aren't two of the purposes behind the 1972 amendments to the CWA to provide certainty and economic efficiency? If water quality standards are enforceable without being reduced to specific requirements in permits, won't the permittee remain uncertain as to what steps it must take, what pollutants it must control, and how much money it is expected to spend in order to reduce pollution?
2. Aren't there five steps which must be taken before a water quality standard can be meaningfully applied to individual discharges? (1. designate use; 2. develop criteria based on the use; 3. determine the Total Maximum Daily Load (TMDL) for each pollutant in order to achieve the criteria; 4. allocate the pollution reduction among the sources of the pollutant; and 5. translate the waste load allocation into effluent limitations in permits) And isn't the first step the only one which has been completed in this case?
3. Sigma Chemical is discharging twice as much selenium as XXX. Yet, because XXX is one mile downstream of Sigma Chemical, XXX is charged with violating the water quality standard. Is it fair that XXX carries the entire burden for violating the water quality standard? Aren't the very purposes of the TMDL and waste load allocation processes to fairly allocate water quality standards required treatment in such circumstances?

Questions for XXX and New Union:

1. Why have some courts found that water quality standards without criteria are enforceable?
2. Narrative criteria have often been enforceable and they contain no numeric limitation. Why should the water quality standard in the instant case be treated any differently?

3. Don't we have criteria for selenium in the form of the MCL established by the EPA pursuant to the SDWA?

4. CWA section 501(f), 33 U.S.C. § 1361 (1994), defines effluent limitations, and it includes standards and limitations from CWA Sections 301, 302, 306, 307, 401, 402, 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1341, 1342 (1994). It does not include CWA Section 303, 33 U.S.C. § 1313 (1994), which addresses state water quality standards. Isn't it true that water quality standards are only enforceable when they are reduced to effluent limitations in permits?

QUESTIONS PRESENTED

I. WHETHER GROUNDWATER IS "NAVIGABLE WATER" FOR PURPOSES OF THE CLEAN WATER ACT.

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a) (1994). The legislation was passed partially in response to findings that "many of the Nation's navigable waters are severely polluted, and major waterways near the industrial and urban areas are unfit for most purposes." S. Rep. 92-414 at 7 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

Congress was not explicit, however, whether the CWA was intended to protect groundwater as well as surface water.

Groundwater is part of the hydrologic cycle. Precipitation returns to the earth's surface and collects in streams, lakes, rivers, and other bodies of water. *See* G. Tyler Miller, *Living in the Environment* 101 (Wadsworth Publishing, 8th ed. 1994). However, the precipitation also permeates the soil and seeps downward. *See id.* The groundwater flows downhill, as do surface rivers and streams, and eventually empties into streams, lakes, or springs. The layer of rock or soil containing the groundwater is referred to as an aquifer. *See id.*

The CWA prohibits the "discharge of any pollutant by any person" unless the discharge is in compliance with the CWA. CWA § 301, 33 U.S.C. § 1311 (1994). Determining the

precise implications of the prohibition requires an examination of several definitions. An analysis of these definitions is necessary to determine whether the prohibition includes discharges into groundwater.

The CWA defines the “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” CWA § 502c(12), 33 U.S.C. § 1362(12) (1994 & Supp. II). “Pollutant,” “navigable water,” and “point source” are further defined by the CWA but “addition” is not. *Id.* The definition of “pollutant” provides a list of materials but specifically excludes material that is injected into a well, and then to groundwater, for the purpose of facilitating oil or gas production. CWA § 502(6)(B), 33 U.S.C. 1362(6)(B) (1994 & Supp. II 1996). “Navigable waters” is defined as “the waters of the United States.” CWA § 502(7), 33 U.S.C. § 1362(7) (1994 & Supp. II). Courts have disagreed as to whether or not “navigable waters” includes groundwater.

The Environmental Protection Agency (EPA), charged with administering the CWA, interpreted the phrase “waters of the United States” to include “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . . ; all interstate waters . . . ; [and] tributaries of waters identified [in the rest of the definition].” 40 C.F.R. § 122.2 (1998). However, the EPA has not specifically interpreted “navigable waters” to either include or exclude groundwater.

XXX claims that groundwater is not “navigable water” under the CWA. In order to support this claim, XXX relies on decisions which have specifically held that groundwater is not “navigable water.” XXX also relies on the legislative history and the language of the CWA, as well as the absence of a reference to groundwater in EPA’s definition, to argue that groundwater is not “navigable water.” If groundwater is not “navigable water” under the CWA, then the seepage of lead from the wastepile into the groundwater is not a discharge prohibited by the CWA. This is because the CWA only prohibits discharges into “navigable water.”

FOR maintains that groundwater is tributary to surface water and therefore “navigable water.” Therefore, the seep-

age of lead from the wastepile constitutes the discharge of a pollutant into "navigable water" without a permit. Like XXX, FOR relies on the legislative history and language of the CWA to support its argument. FOR also points to decisions which have held that groundwater can be "navigable water." FOR notes that the cases relied upon by XXX did not address "tributary groundwater" which connects to navigable-in-fact surface waterways. Such "tributary groundwater" has been held to be "navigable water." The EPA has also recognized groundwater that has a hydrological connection to groundwater and surface water as being "waters of the United States." National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (1990). XXX counters that the "tributary groundwater" decision relied upon by FOR is irrelevant because it addressed "tributary groundwater" that was immediately adjacent to navigable-in-fact surface waters as opposed to being separated by a mile as in the instant case.

A. Groundwater Is Not "Navigable Water" For Purposes Of The Clean Water Act.

1. The Clean Water Act

a) Legislative History

The legislative history of the CWA supports the assertion that the CWA does not regulate groundwater as "navigable water." "Several bills pending before the Committee provided authority to establish federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from state to state, the Committee did not adopt this recommendation." S. Rep. No. 92-414 at 73 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739. The CWA is not intended to address groundwater contamination. The Senate was not ignorant of the hydrologic cycle. The Senate Report stated that "[t]he Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction. Thus, the Committee bill requires in [CWA] Section 402 that each state in-

clude in its program for approval under Section 402 affirmative controls over the injection or placement in wells of any pollutants that may affect ground water." *Id.*; CWA § 402, 33 U.S.C. § 1342 (1994). The incorporation of these two passages in the same report suggest that the second statement is not evidence of an intent to cover groundwater, as argued by FOR.

The rejection of an amendment proposed by Representative Aspin also supports the argument that groundwater contamination is not regulated under the CWA. Representative Aspin proposed an amendment to provide enforcement over ground water. 118 Cong. Rec. 10,666 (1972). The rejection of the amendment "militates strongly against a judgment that Congress intended a result that it expressly declined to enact." *United States v. GAF Corp.*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974)).

The EPA itself has refrained from including groundwater in the agency's definition of "navigable waters." In the Preamble to the NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (1990), the EPA stated that "this rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)." *Id.*, quoted in *Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 966 (7th Cir. 1994). Consistent failure to mention groundwater in regulations, while referring to other less important types of water (such as playa lakes) indicates there is no inclusion of groundwater in "navigable waters."

b) The Statute

The definition of "navigable water" in Section 502, CWA § 502, 33 U.S.C. § 1362 (1994 & Supp. II 1996), does not indicate whether the term includes groundwater. The definition is silent on the matter. Likewise, sections of the CWA regarding permitting and enforcement fail to address whether "navigable water" includes groundwater. CWA §§ 309, 402,

505, 33 U.S.C. §§ 1319, 1342, 1365 (1994). The CWA's silence implies the absence of groundwater from "navigable water." In addition, navigability implies the use of a waterway by surface water transportation. Indeed, the plain meaning of "navigable" is "deep enough and wide enough to afford passage to ships." *Webster's Ninth New Collegiate Dictionary* 789 (9th ed. 1989).

Use of the terms "navigable water," "surface water," and "groundwater" repeatedly throughout the CWA support the conclusion that Congress intended "navigable water" to carry its plain meaning as surface water. Congress never used "navigable water" in the same sentence as "surface water" in the CWA, rather it used the terms interchangeably in different sentences, equating their meanings. On the other hand, when Congress used "groundwater" it was often in conjunction with either "navigable water," CWA §§ 102(a), 104(a)(5), 106(e)(1), 304(f)(F), 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256(e)(1), 1314(f)(F) (1994), or "surface water," CWA §§ 202(b)(2), 208(b)(2)(K), 502(6), 33 U.S.C. §§ 1282(b)(2), 1288(b)(2)(K), 1362(6) (1994 & Supp. II 1996). Unless "groundwater" means something other than "navigable water" and "surface water," it is surplusage in these sentences. Therefore, the prohibition against discharging pollutants into "navigable waters" through permit sources without a permit defined in CWA Sections 301(a) and 502, 33 U.S.C. §§ 1311(a), 1362 (1994 & Supp. II 1996), refers to discharges into surface water, not groundwater.

In addition, the goal of the CWA is to attain fishable, swimmable waters. CWA §101(a)(2), 33 U.S.C. § 1251(a)(2) (1994). Fishing and swimming are surface water activities. However, groundwater is not used for fishing and swimming. Therefore, "navigable water" does not include groundwater, but, rather, is only limited to surface water.

c) Other Federal Statutes Relating To Groundwater Protection

The CWA does not provide for enforcement against groundwater contamination. Two other environmental statutes, enacted after the CWA, specifically address the protec-

tion of groundwater. Protection of groundwater by these statutes would not be necessary if groundwater contamination was already addressed by the CWA. The fact that Congress specifically addressed groundwater in other statutes suggests it did not do so by silence in the CWA.

(1) The Safe Drinking Water Act

The Public Health Service Act (Safe Drinking Water Act (SDWA)) of 1974, 42 U.S.C. §§ 300f-300j-26 (1994 & Supp. II 1996), provides for the protection of underground sources of drinking water. 42 U.S.C. § 300h. The legislative history of the SDWA indicates that the CWA does not regulate groundwater. The House Report stated "it appears that the Federal Water Pollution Control Act may not authorize any regulation of deep well injection of wastes which is not carried out in conjunction with a discharge into navigable waters [Therefore], the Committee has determined that broadened and strengthened legislation to assure safe drinking water is necessary." H.R. Rep. No. 93-1185, at 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6457, 6457. Like the CWA, the Administrator has control over the effectiveness of the SDWA programs. The states are required to develop programs to prevent "underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). If a person is not in compliance with the program, the SDWA provides for civil and criminal penalties comparable to those under the CWA. 42 U.S.C. § 300h-2. The SDWA also requires implementation of a wellhead protection area program and a sole source aquifer program. SDWA §§ 1427, 1428, 42 U.S.C. §§ 300h-6, 300h-7 (Supp. II 1996). States must adopt and submit to the Administrator a state program to protect the "surface and subsurface area surrounding . . . water well[s] or wellfield[s]" within their jurisdiction from contaminants which may have an adverse effect on the health of persons." SDWA § 1428, 42 U.S.C. § 300h-7 (Supp. II 1996). States must also develop a plan to protect those aquifers which are determined by the Administrator to be the "sole or principal drinking water source for the area." SDWA § 1427(a), 42 U.S.C. § 300h-6(a) (Supp. II 1996). The SDWA provides comprehensive pro-

grams to regulate the contamination of groundwater which is used as a source of drinking water. Such provisions would be unnecessary and redundant if the CWA were already regulating groundwater.

(2) The Resource Conservation And Recovery Act

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994), also protects groundwater. Several provisions in RCRA specifically address the protection of groundwater. First, RCRA Section 3004(f), 42 U.S.C. § 6924(f), provides for regulation of deep well injection of hazardous wastes. Second, RCRA regulates the disposal of liquid in landfills if there is a danger that such disposal will contaminate an underground source of drinking water. 42 U.S.C. § 6924(c). Third, hazardous waste treatment, storage, and disposal facilities must meet certain groundwater monitoring requirements. *See* 42 U.S.C. § 6924(p). Finally, RCRA Section 3020, 42 U.S.C. § 6939(b), prohibits the disposal by underground injection into or above an underground source of drinking water. RCRA specifies that "the prohibitions . . . shall be enforceable under the Safe Drinking Water Act . . . in any State . . . which has adopted identical or more stringent prohibitions under the Safe Drinking Water Act . . . and which has assumed primary enforcement responsibility under that Act . . . for enforcement of such prohibitions." RCRA § 3020, 42 U.S.C. § 6939b (1994). It would be inconsistent for RCRA to provide for enforcement of groundwater under the SDWA but not under the CWA if both acts regulate the contamination of groundwater. Moreover, regulation of groundwater contamination from hazardous waste treatment, storage, and disposal facilities would be unnecessary and redundant if such facilities were already regulated as point or non-point sources under the CWA for their discharges to groundwater.

2. Precedent

a) EPA Jurisdiction Over Deep Well Injection

In two early cases, EPA asserted limited jurisdiction over contamination of groundwater by means of the discharge of pollutants through injection wells. See *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975). EPA's theory was that states had to have authority to control injection wells in order for EPA to approve their permit programs, CWA § 402(b)(1)(D), 33 U.S.C. § 1342(b)(1)(D) (1994), and EPA's own permit authority was the same as the states'. CWA § 402(a)(3), 33 U.S.C. § 1342(a)(3) (1994). In *GAF*, EPA sought to enjoin the construction and operation of an injection well without a permit. *GAF*, 389 F. Supp. at 1379. The court easily denied the injunction, holding EPA had no jurisdiction over discharges of pollutants into groundwater. See *Id.* at 1387. The court held that CWA Section 402(a)(3), 33 U.S.C. § 1342(a)(3) (1994), does not incorporate the requirement for authority to "control the disposal of pollutants into wells." *GAF*, 389 F. Supp. at 1384. "Congress could not possibly have meant to achieve in a roundabout fashion what it expressly declined to accomplish straightforwardly." *Id.* The *GAF* court relied on Senate Report No. 92-414 which stated that the Committee did not adopt bills that were pending which "provided authority to establish federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations . . . [b]ecause the jurisdiction regarding groundwaters is so complex and varied from state to state." *Id.* at 1383 (citing S. Rep. 92-414 at 73).

In the second case, *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977), the holder of an EPA issued permit, limiting its discharges to both surface and groundwater, challenged the permit on the basis that EPA had no jurisdiction to issue a permit governing deep well injection. *Id.* at 1311. In holding the EPA lacked jurisdiction over discharges to groundwater, the court examined provisions in the CWA addressing groundwater. See *id.* at 1318. First, the court identified three sections providing a plan for the EPA and states to de-

velop information to control groundwater. *Exxon*, 554 F.2d at 1323. See CWA §§ 102(a), 104(a)(5), 106, 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256 (1994). Second, the court found two provisions referring to the “power of the federal purse to encourage protection by the states of underground waters” and make funding dependent on a showing by the state that the “quantity of available ground water will be insufficient, inadequate, or unsuitable for public use” and the “area-wide treatment plants include the process to control the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality.” *Exxon*, 554 F.2d at 1323. CWA § 208(b)(2)(K), 33 U.S.C. § 1288(b)(2)(K) (1994). Finally, the court examined CWA Section 304(b), regarding guidelines to be transformed into enforceable limitations in NPDES permits. § 304(b), 33 U.S.C. § 1314(b) (1994). Groundwater is not mentioned in Section 304(b), but is mentioned in other subsections of 304. See CWA §§ 304(a),(f), 33 U.S.C. §§ 1314(a),(f) (1994). These other subsections, however, are not translated into enforceable permit limits for surface water discharges. Congress intended the federal government to develop information regarding groundwater pollution. See *id.* However, “the absence of other provisions in the CWA, analogous to Section 301(b), 33 U.S.C. § 1311(b) (1994), for transforming this information into enforceable limitations, strongly suggests that Congress meant to stop short of establishing federal controls over groundwater pollution.” *Exxon Corp. v. Train*, 554 F.2d at 1324. The court noted that CWA Section 402(b)(1)(D), 33 U.S.C. § 1342(b)(1)(D) (1994), which requires the state permit program to have control over disposal of pollutants into wells, is not “fleshed out elsewhere in the CWA or mirrored in any of the sections setting forth the Administrator’s powers.” *Id.* at 1324. The fact that the states have the authority to control what goes into wells is consistent with the intent that the federal government provide information and funding to the states regarding groundwater contamination but leaving to the states the control of groundwater contamination. See *id.* This arrangement with states controlling groundwater was the method Congress elected to take “while the Administra-

tor began assembling the information needed for Congress to legislate intelligently on the subject.” *Id.* at 1329. The *Exxon* court held that the intention was partly achieved two years later when Congress enacted the SDWA.

Thus, EPA’s very limited assertion of jurisdiction over contamination of groundwater was rejected by the courts and appears to have been abandoned by EPA. The limited nature of EPA’s assertion of groundwater — deep well injection in conjunction with surface water discharge — is significant, underlying EPA’s disavowal of broad jurisdiction over contamination of groundwater.

b) EPA Jurisdiction Over Discharges To Tributary Groundwater

Courts have held that the discharge of pollutants to groundwater which is tributary to surface water does not require an NPDES permit. In a recent case, *Umatilla Water-Quality Protective Ass’n v. Smith Frozen Foods*, 962 F. Supp. 1312 (D. Or. 1997), the court held that even groundwater with a hydrological connection to surface water is not covered by NPDES permitting. *Id.* at 1318. The court based its holding on several grounds. First, when Congress wanted the statute to apply to groundwater elsewhere in the CWA, Congress expressly stated so. *See id.* Second, the legislative history supported the argument that the CWA was not intended to regulate discharges into groundwater. *See id.* Third, the EPA had not provided a “formal and consistent” interpretation that groundwater is subject to NPDES permitting. *Id.* at 1319. Finally, the court wanted to avoid the “practical consequences to water quality regulation if [the court] were to include hydrologically-connected groundwater within the NPDES permit program . . . [A]lthough in some cases . . . the fact that groundwater connects to surface water is relatively easy to discern, such connections are often not obvious.” *Id.* at 1320. *See also Village of Oconomowoc Lake v. Dayton Hudson*, 24 F.3d 962 (7th Cir. 1994) (holding groundwater that is hydrologically connected with surface waters is not regulated by the Clean Water Act); *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985) (concluding NPDES pro-

gram does not extend to groundwater that is connected to surface water).

The court decisions, legislative history, and the language of the statute support this Court finding that the seepage of lead from the wastepile, subsequently contaminating groundwater, is not a violation of the CWA. The CWA prohibits the contamination of "navigable water." Groundwater is not "navigable water." Congress intended to regulate the contamination of groundwater through the SDWA. The CWA is limited to protecting surface waters.

B. Groundwater Is "Navigable Water" For Purposes Of The Clean Water Act.

1. The Clean Water Act And EPA Regulations

a) The Legislative History

The legislative history of the CWA emphasizes the broad reach of the term "navigable water." The Senate Report illustrates the intent to protect tributaries of "navigable waters." The Senate Report stated:

The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

S. Rep. No. 92-414 at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3742-3743. Representative Dingell, Chief Sponsor in the House, stated that "navigable waters" are³ "all the 'waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws Thus, this new definition clearly encompasses all water bodies, in-

cluding main streams and their tributaries, for water quality purposes.” Mary Christina Wood, *Regulating Discharges Into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 HARV. ENVTL. L. REV. 569, 589 (1988) [hereinafter Wood] (citing 1 A Legislative History of the Water Pollution Control Act Amendments of 1972 at 250 (1973) [hereinafter Legislative History]). Although Representative Kemp did not specifically mention groundwater, he did note that the intent of the CWA is to reach the full extent of Commerce Clause jurisdiction. The fact that the reach of the Commerce Clause extends to groundwater is evidenced by groundwater regulation in various federal statutes. Representative Kemp also noted that “for the first time groundwaters have been given the same emphasis as surface waters . . . (the CWA is) an important step forward in the protection of the underground environment.” *United States Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (citing Legislative History at 250).

The House rejected Representative Aspin’s proposed amendment which would have expanded federal regulation of groundwater. However, the rejection does not necessarily mean that the House was rejecting federal regulation over groundwater. First, the amendment may have been considered redundant because groundwater was already contemplated by the CWA. Second, the amendment also proposed to delete the oil and gas injections exception in CWA Section 502(6)(B), 33 U.S.C. § 1362(6)(B) (1994 & Supp. II 1996). See *Steel*, 556 F.2d at 852 n. 66. The debate focused on the intent to “eliminate the inconsistency between the way we treat oil companies and the way we treat other companies The oil industry does it [Yet] waste injection wells of the steel industry are covered. The waste injection wells of every industry except oil are covered.” *Steel*, 556 F.2d at 852 (quoting Legislative History at 589-590 (remarks of Rep. Aspin)). The argument in opposition to the Amendment was that “we have more stringent regulations now on the oil industry than we could ever impose through this legislation.” *Steel*, 556 F.2d at 852 (quoting Legislative History at 589-590 (remarks of Rep. Roberts)). “The House debate on the amendment, therefore,

confirms [the] conclusion that the Act contemplates state and federal restrictions on waste disposals into wells." *Steel*, 556 F.2d at 852.

b) Permitting Authority

An analysis of the permitting section of the CWA indicates that the Administrator has jurisdiction over discharges into wells which may contaminate groundwater. The CWA provides that state permit programs "shall be approved by the Administrator only if adequate authority exists to . . . issue permits which . . . [*inter alia*] control the disposal of pollutants into wells." CWA § 402(b)(1)(D), 33 U.S.C. § 1342(b)(1)(D) (1994). The CWA also requires that the Administrator's permit program is "subject to the same terms, conditions, and requirements as apply to a state permit program." CWA § 402(a)(3), 33 U.S.C. § 1342(a)(3) (1994). The basic prohibition of the CWA is against the discharge of pollutants into "navigable waters" without permits. CWA §§ 301(a), 502, 33 U.S.C. §§ 1311(a), 1362 (1994 & Supp. II 1996). Yet, injections into wells are discharges into groundwater. If the Administrator has authority to issue permits for injection of pollutants into wells, then groundwater must be "navigable water."

An Opinion Letter from the Office of the General Counsel specifically addressed whether the EPA has authority to regulate the injection into wells of industrial waste by NPDES permits. *Exxon Corp. v. Train*, 554 F.2d 1310, 1321 n. 21 (5th Cir. 1977) (quoting Opinion Letter from the Office of the General Counsel, December 13, 1973). The Office of General Counsel stated that "the EPA has authority to control well injection through conditions in NPDES permits issued for discharges into navigable waters. *See id.* The Office of General Counsel added "that disposal of pollutants into wells is subject to regulation through conditions in an NPDES permit issued for an associated surface water discharge." *Id.*

If CWA Section 402(a)(3) is interpreted not to incorporate Section 402(b)(1)(D), two inconsistencies result. 33 U.S.C. §§ 1342(a)(3), (b)(1)(D); Wood, *supra*, at 604. First, authority to regulate wells rested in the states and not in the federal

government. *See* Wood, *supra*, at 604. The Administrator has the authority to approve or deny the state program based on whether the program has adequate authority to fulfill the federally mandated requirements. *See* CWA § 402(b), 33 U.S.C § 1342(b) (1994). However, the Administrator could not implement the condition himself. *See id.* Second, there would be jurisdiction to control deep well injection to groundwater in states with EPA approved state permit programs but not in states in which the permit program is administered the federal government. *See* Wood, *supra*, at 604.

c) The Definitions

The definitions also provide insight into whether or not Congress intended the CWA to regulate groundwater. First, it has been mentioned that the discharge of a pollutant into “navigable waters” from a point source is forbidden under the CWA. CWA § 502(12), 33 U.S.C. § 1362(12) (1994 & Supp. II 1996). According to the CWA, a well is a “point source.” CWA § 502(14), 33 U.S.C. § 1362(14) (1994 & Supp. II 1996). Wells empty into underground water and not surface water. The only reason for wells to be included in the definition of “point source” is to protect against the contamination of groundwater.

Second, a discharge is only prohibited if it discharges into “navigable waters.” At one time the term “navigable water” generally referred to waters which could be navigated in fact. *The Daniel Ball*, 77 U.S. 557, 563 (1870). Over the years, the concept of navigable waters has continued to expand. The definition of “navigable water” in the CWA is “waters of the United States.” CWA section 502(7), 33 U.S.C § 1362(7) (1994).

The Act’s definition of ‘navigable waters’ as the ‘waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import. In adopting this definition . . . Congress evidently intended to repudiate limits that had been in place on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least

some waters that would not be deemed to be 'navigable' under the classical understanding of that term.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985). Due to the broad interpretation of the term, there is no reason "navigable waters" should be limited to surface waters. Rather, "navigable water" should be interpreted to regulate all waters which affect commerce.

Finally, the CWA only prohibits discharges of "pollutants." The definition of "pollutant" in the CWA excludes injections into wells relating to the production of oil or gas if the "[s]tate determines that such injection or disposal will not result in the degradation of ground or surface water resources." CWA § 502(6), 33 U.S.C. 1362(6) (1994 & Supp. II 1996). The exception was intended to assure that no injection or disposal occur in such a manner as to present a potential hazard to ground water quality. *United States Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (quoting Legislative History at 178 (remarks of Senator Muskie)). The exclusion of certain types of injections into wells indicates that the remaining injections fall within the definition of "pollutant." The exception also demonstrates that Congress intended to prevent harm to groundwater quality from injections and disposal.

The EPA's definition of "navigable water" includes tributaries. See 40 C.F.R. § 122.2 (1998). Groundwater serves as a tributary to "navigable water." EPA's definition does not exclude groundwater. Therefore, EPA's definition includes groundwater by implication.

i) Other Federal Statutes Addressing Groundwater

Other federal statutes which address the regulation of groundwater expressly recognize the jurisdiction of the CWA. The SDWA is not intended to replace the CWA:

Except for the provisions of section 302 (relating to the transfer of funds) . . . nothing in this Act or in any amendments . . . shall be construed by the Administrator of the Environmental Protection Agency or the courts as affecting, modifying, expanding, changing, or altering . . . the provisions of the Federal Water Pollution Control Act . . .

the duties and responsibilities of the Administrator under that Act . . . or the regulation or control of point or non-point sources of pollution discharged into waters covered by that Act.

SDWA § 1401, 42 U.S.C. § 300f (Supp. II 1996); *see also* Safe Drinking Water Amendments of 1996, 110 Stat. 1614, Aug. 6, 1996, Pub. L. No. §§ 104-182 § 2(c). The purpose of the SDWA is to “assure that water supply systems serving the public meet minimum national standards for protection of public health.” H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N 6457. The Committee acknowledged that legislation was needed because no current laws adequately assured safe drinking water sources. *Id.* The purposes of the two acts are different. The goal of the CWA is to attain fishable, swimmable water. CWA §101(a)(2), 33 U.S.C. § 1251(a)(2) (1994). The purpose of the SDWA is to regulate those public water systems to provide clean drinking water at the tap. 42 U.S.C. § 300h(b)(1).

The Sole Source Aquifer Demonstration Program of the SDWA only protects those critical aquifers which are the “sole or principal drinking water source for the area . . . which, if contaminated, would create a significant hazard to public health.” SDWA § 1424(e), 42 U.S.C. § 300h-3(e) (Supp. II 1996). The program does not protect all aquifers. Therefore, the regulation of groundwater under the SDWA does not preclude regulation under the CWA.

RCRA does not replace CWA jurisdiction over groundwater either. RCRA states “nothing in this chapter shall be construed to apply to . . . any activity or substance which is subject to the Federal Water Pollution Control Act . . . , [or] the Safe Drinking Water Act . . . , except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act.” RCRA § 1006(a), 42 U.S.C. § 6905(a) (1994). The two Acts are intended to be treated harmoniously. In fact, RCRA requires the “Administrator [to] integrate all provisions of this chapter for purposes of administration and enforcement and shall . . . duplication, to the maximum extent practicable, with the appropriate provi-

sions of . . . the Federal Water Pollution Control Act . . . [and] the Safe Drinking Water Act." RCRA § 1006(b), 42 U.S.C. § 6905(b) (1994). Even in the CWA required permits for discharges to groundwater from point sources, the SDWA and RCRA would still be needed to protect groundwater from contamination from non-point sources.

2. Precedent

Courts have read the CWA broadly and recognized that some groundwater is tributary groundwater and therefore subject to regulation under the CWA. Over the years, the courts have held that the authority under the CWA is as extensive as the Commerce Clause of the United States Constitution permits. In *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), the court held that "federal authority over water pollution properly rests on the Commerce Clause and not on past interpretations of an act designed to protect navigation." *Id.* at 676. Every body of water that may be affected by interstate commerce in any way is subject to regulation. See *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979). The jurisdiction of the CWA is the maximum extent of the Commerce Clause. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct. Cl. 1981). As a result, courts have held that the CWA provides authority to regulate all waters geographically within the borders of the United States. See *United States v. Ashland Oil & Transp., Co.*, 504 F.2d 1317, 1324 (6th Cir. 1974); *PFZ Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.C. Cir. 1975) (concluding reach all waters of the United States in the geographic sense in order to control pollution at its source). The authority under the Commerce Clause extends to regulation of groundwater. Groundwater is used as a source of drinking water and irrigation, which affect interstate commerce. Groundwater also flows into rivers, lakes, and other surface waters which are recognized as falling within the jurisdiction of the Commerce Clause. In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Supreme Court held that groundwater is an article of interstate commerce. *Id.* at 953-954.

a) EPA And The Courts Recognize Tributaries As
“Navigable Waters”

The abandonment of the concept of physically navigable waters in defining “navigable waters” has led both EPA and the courts to include non-navigable tributaries in the definition. EPA includes tributaries to lakes, rivers, and other waterbodies as “waters of the United States.” 40 C.F.R. § 122.2 (1998). Therefore, tributaries to surface waters are “navigable water.”

The court in *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), recognized that tributary waters were intended to be covered by the CWA. *See id.* at 1329. If tributaries were not protected, the navigable-in-fact waters into which contaminated tributaries flowed would be polluted, as well as the tributaries themselves. The *Ashland Oil* court addressed the issue of whether contamination of a tributary, which was separated from a navigable waterway by two other tributaries was a violation of the CWA. *See Ashland*, 504 F.2d at 1320. The court did not require any evidence that the pollutants from the tributary ever reached the navigable-in-fact waterway. *See id.* at 1329. The court recognized the “impossibility of such proof in many if not all cases.” *Id.*

In *United States v. Texas Pipe Line Co.*, 611 F.2d 345 (10th Cir. 1979), the court was faced with a similar question. Contaminants were discharged into a tributary separated from a navigable-in-fact waterway by three tributaries. *See Texas Pipe Line*, 611 F.2d at 346-347. No evidence was presented as to whether the intermediate streams were flowing. *See id.* at 347. The likelihood of the pollutants reaching the navigable waterway was small. *See id.* Furthermore, the court could not determine a link between the contaminated tributary and interstate commerce. *See id.* Nevertheless, the court held that a violation of the CWA had occurred. *See id.*

In *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), there were discharges of pollutants into otherwise dry arroyos. *See id.* at 129. Any flow in the arroyos only progressed a short distance. *See id.* The connection of the

arroyos with navigable-in-fact water occurred only when there were heavy rains. *See id.* Some of the flow did continue through underground aquifers to the navigable waterway. *See id.* The court found that the occasional surface flow in addition to the underground flow were sufficient to characterize arroyos as tributaries. *See id.* at 139.

b) Groundwater

Courts addressing the inclusion of groundwater tributaries within the jurisdiction of the CWA focus on the connection between the tributaries and navigable waterways. In some cases the connection has been tenuous. Nevertheless, courts have held that discharges to groundwater tributaries are regulated by the CWA. Groundwaters, as part of the hydrologic cycle, serve as tributaries to surface waters and are therefore subject to regulation under the CWA.

In *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995), there was contamination of an arroyo. *Id.* at 1356. The court recognized the arroyo may be subject to regulation under the CWA if “the water from [the] arroyo . . . eventually winds its way to interstate waters or waters affecting interstate commerce.” *Id.* at 1356. The plaintiffs must “provide some evidence to suggest that water originating in the Arroyo near the overburden has at least at some time in the past eventually made its way to the Rio Grande, either by way of the Arroyo and [the creek] or through the groundwater, and is reasonably likely to do so again.” *Id.* at 1357. The court recognized that in general, “hydrologically connected groundwaters are regulated waters of the United States.” *Id.* at 1358. Other courts have also held that groundwater which, is hydrologically connected to surface water, is regulated by the CWA. *See Steel*, 56 F.2d at 853 (concluding that regulation of deep well injection, at least when regulation is in conjunction with limitation on the permittees discharge into surface waters, is permissible); *Mutual Life Ins. Co. of N.Y. v. Mobil Corp.*, No. CIV.A.96-CV1781, 1998 WL 160820 (N.D.N.Y. Mar. 31, 1998) (holding that if there is a hydrologic connection, but not a general connection, with surface waters, the groundwater is regulated by

NPDES); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997) (determining that if groundwater is hydrologically connected to surface waters then it is “navigable water”); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983 (E.D. Wash. 1994) (holding that groundwater is covered if can trace from source to surface water); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993) (concluding that groundwater connected to surface water is regulated by the NPDES program); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995), *and cert. denied*, 116 S. Ct. 51 (1995) (determining that there must be a showing groundwater is connected to the surface water).

The lead from the wastepile on XXX’s property permeates the soil to the groundwater. The groundwater flows as a tributary in the direction of the Roaritan River. Courts have held and EPA has interpreted “water of the United States” to include tributaries. See e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985); *Umatilla Water-Quality Protectice Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1314-1315 (D. Or. 1997). Other courts have held that groundwater which is connected to surface water is “navigable water” for purposes of the CWA. See e.g., *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319 (S.D. Iowa 1997); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995). Decisions such as *United States v. GAF*, 389 F. Supp. 1379 (S.D. Tex. 1975), and *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977), do not preclude such findings that discharges to tributary groundwater, such as the groundwater at issue in the instant case, are controlled by NPDES permitting. Both courts held that discharges to the relevant groundwater are not subject to control by NPDES permitting. See *GAF*, 389 F. Supp. At 1384; *Exxon*, 554 F.2d at 1320. However, the *GAF* decision was based on the discharge of pollutants into wells with no discussion of a connection between the groundwater and surface waters. *GAF*, 389 F. Supp. At 1383. The *Exxon* court also expressly limited its holding to groundwa-

ters with no connection to surface waters. *Exxon*, 554 F.2d at 1312 n.1. The *Exxon* court "express[ed] no opinion on what the result would be if [the groundwaters were alleged to be connected to surface waters]." *Id.*

II. WHETHER THE CHALLENGE TO SECTION IIA3 OF THE PERMIT REQUIRING COMPLIANCE WITH WATER QUALITY STANDARDS IS TIME-BARRED.

Section 509(b)(1) of the CWA provides for judicial review of a permit within 120 days after it is issued and Section 509(b)(2) bars judicial review thereafter if review could have been had under 509(b)(1). CWA §§ 509(b)(1)-(2), 33 U.S.C. §§ 1369(b)(1)-(2) (1994). Review of a permit condition which is not ripe for review within that 120-day period may be had when it becomes ripe. XXX may therefore challenge the validity of the water quality requirement of the permit in a case seeking to enforce that requirement only if that requirement was not ripe when the permit was issued. If Congress articulates a statutory time limitation for judicial review, the action will be time-barred if the statutory time period has run and the action has not been brought. Therefore, a conflict between ripeness and timeliness arises when a challenge, subject to a statutory time limitation for judicial review, is not ripe during the statutory time period.

A court may only hear a challenge to an action of an administrative agency if the action is ripe for judicial review. The courts have developed tests to determine whether or not an action is ripe for review. The Supreme Court articulated a two-fold inquiry. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967). In order to determine whether an issue is ripe for review, a court must 1) determine whether the issue presented is fit for judicial resolution, and 2) assess the hardship to the parties if judicial relief is denied at the stage in which it is before the court. See *id.*; see also *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). The rationale behind limiting judicial review to those actions which are ripe is to "prevent the courts, through premature adjudication, from

entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott*, 387 U.S. at 148. The “fitness of the issues” test requires consideration of the “institutional capacities of, and the relationship between, courts and agencies.” *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985). If the issue is a purely legal question the court should “assume its threshold suitability for judicial determination.” *Id.* The court should also “consider whether the agency or the court will benefit from deferring review until the agency’s policies have crystallized and the ‘question arises in some more concrete and final form.’” *Id.* The second prong of the ripeness test requires a determination as to whether or not any harm to a petitioner will outweigh the benefits to the agency and the court if review is deferred. *See id.* at 918.

XXX argues that the challenge to the permit condition was not ripe when the permit was issued. Consequently, the issue was not ripe during the statutory time period. The challenge requires a more concrete factual context on which the Court can base its decision. When the permit was issued, it contained a blanket prohibition on violating state water quality standards. It was impossible for XXX to know the extent to which that limited its discharge of any particular pollutant or to anticipate that the requirement would subject it to standards promulgated under another act, the SDWA, which was intended to regulate drinking water utilities. Therefore, XXX argues the statutory time period should not have begun to run when the permit was issued.

FOR claims that the challenge to the permit condition must have been brought during the statutory time period and that the opportunity for review is now lost. According to the CWA, any challenge which could have been brought during the statutory time-period and was not brought cannot be raised in an enforcement proceeding. In addition, FOR argues the issue of whether or not a water quality standard must be reduced to numerical or other specific requirements in a permit is a purely legal issue, requiring no factual con-

text. The issue was therefore ripe during the statutory time period. Even if XXX did not believe the issue was ripe for review during the statutory time period, XXX was required to bring the challenge during the statutory time period and await determination by the court as to whether the issue was ripe for review.

A. The Challenge To The Permit Section Was Ripe When The Permit Was Issued And Is Now Time-Barred.

1. The Clean Water Act

The Administrative Procedure Act (APA) establishes a presumption that a final agency action is subject to judicial review. APA §§ 702, 704, 5 U.S.C. §§ 702, 704 (1994). In enacting the CWA, Congress recognized that preclusion of judicial review of "matters committed by statute to administrative discretion," S. Rep. No. 92-414 at 85 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3750, "requires a showing of clear evidence of legislative intent." *Id.* (quoting *Environmental Defense Fund v. Hardin*, (C.A. No. 23,813, May 28, 1970); *see also Barlow v. Collins*, 397 U.S. 159, 167 (1970); *Abbott*, 387 U.S. at 140-141. As a result, Congress expressly limited the time period for judicial review of agency actions in CWA Section 509. The Senate Report reveals the congressional intent behind Section 509:

The Courts have granted this review to those being regulated and to those who seek to 'protect the public interest in the proper administration of a regulatory system enacted for their benefit.' Since precluding review would not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods In order to maintain the integrity of the time sequences provided throughout the Act, the section would provide that any review sought must be filed within 30 [today, 120] days of the date of the challenged promulgation or other action.

S. Rep. No. 92-414 at 85 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3750-51 (citations omitted). This indicates the Senate intended that judicial review should be

available to a limited extent. The limitation was intended to protect "the integrity of the time sequences provided throughout the Act" S. Rep. No. 92-414 at 85 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3751. The report acknowledged only one exception to the statutory limitation:

In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard, requirement, or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any requirement after the date of promulgation whenever it is alleged that significant new information has become available.

S. Rep. No. 92-414 at 85 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3751. Congress included this exception to the time limitation in the judicial review section of the CWA. *See* CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1) (1994).

2. Precedent

a) The Challenge To The Permit Is Not Timely

The CWA requires judicial review of the issuance or denial of a permit be sought within 120 days of the permit being issued or denied. CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1) (1994). Therefore, any challenge to a permit condition must also be sought within 120 days of the permit being issued. *See Public Interest Research Group of N.J. v. Yates Indus.*, 757 F. Supp. 438 (D.N.J. 1991) (holding failure to seek review of bioassay parameters in permit pursuant to state agency procedures and time limitations precluded review by the court); *Porter County Chapter of the Izaak Walton League of Am., Inc. v. Costle*, 571 F.2d 359 (7th Cir. 1978); *Sun Enters. v. Train*, 532 F.2d 280 (2d Cir. 1976).

In *Texas Municipal Power Agency v. EPA*, 799 F.2d 173 (5th Cir. 1986), the court held that it lacked the power to review an agency action brought after the statutory time period for judicial review had lapsed. The Fifth Circuit recognized

that "time limitations impart finality to the administrative process, thus conserving administrative resources The requirements show a congressional decision to impose statutory finality on agency actions that we, as a court, may not second-guess." *Id.* at 175.

The Sixth Circuit held similarly. The court in *Peabody Coal Co. v. Train*, noted that the "court is not given to harsh application of statutes of limitation But [the court found] no facts . . . which suggest[ed] equitable tolling of [the Clean Water Act]." *Peabody*, 518 F.2d 940, 942 (6th Cir. 1975). The court stated that it was being asked to judicially amend the CWA by extending the statute of limitations and refused to do so. *See id.* The court noted the sense of urgency in the CWA to protect the environment was similar to that in the CAA, and that sense of urgency was one factor explaining Congress' desire to compress judicial review of requirements established under the two acts. The court therefore based its decision in part on the decisions of other courts which had enforced similar statutory time limits in the CAA. *See id.* at 943 (citing *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974)); *See also Union Elec. Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975); *Getty Oil (E. Oper Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973)). A party making a CWA Section 509 challenge to an action of the administrator must "do so within ninety days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties." *Natural Resources Defense Council, Inc. v. EPA*, 673 F.2d 400, 406 (D.C. Cir. 1981).

b) Challenge Was Ripe When Permit Was Issued

If a court were to apply the ripeness test, despite the strict time limitation in CWA Section 509, CWA § 509, 33 U.S.C. § 1369 (1994), the court would have to conclude that the permit challenge was ripe for review when issued. The first part of the ripeness test, whether the issue is fit for review, is met in the instant case. Whether or not a water quality standard must be reduced to a numerical or specific limitation is a purely legal question and, as such, does not

require a concrete factual context or an attempt at enforcement for resolution.

In *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985), the court held that under circumstances like these it is not necessary to proceed to the "hardship" analysis if the first prong is met. *Id.* at 918. The court noted that "[w]here the first prong of the ripeness test is met and Congress has emphatically declared a preference for immediate review, assuming that constitutional case or controversy requirements have been met, no purpose is served by proceeding to the second prong." *Id.* at 918. Therefore, it would not be necessary for the court to proceed to the second prong in the instant case.

Those cases which have found issues were not ripe during the statutory time period involved review of the Administrator's actions which do "not command anyone to do anything or refrain from anything; . . . do not grant, withhold, or modify any formal legal license, power or authority; . . . do not subject anyone to any civil or criminal liability; [and] create no legal rights or obligations." *Ohio Forestry Ass'n v. Sierra Club*, 118 S.Ct. 1665, 1670 (1998); see also *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *Am. Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (stating that "no facts awaiting development . . . would aid our decision; to the extent any factual questions even exist, they are overshadowed by the legal question that towers over this case"); *Westvaco Corp. v. EPA*, 899 F.2d 1383 (4th Cir. 1990); *Commonwealth Edison, Co. v. Train*, 649 F.2d 481 (7th Cir. 1980). The deferral of judicial review of such actions, of course, did not cause a hardship on any party. The instant case is not such a case. The case here involves an EPA action that imposes new legal obligations on permittees created by every state water quality standard and subjects such permittees to civil or criminal liability if they violated any state water quality standard. The deferral of judicial review of such actions would cause permittees substantial hardship. These are not the circumstances under which courts withhold review during the statutory time periods for review on ripeness grounds.

c) Waiver Of Judicial Review

Some courts "generally refuse to allow late petitions even when petitioners argue that their claims were unripe during the original [statutory] period." *Ass. of Am. R.Rs. v. Surface Transp. Bd.*, 146 F.3d 942, 945 (D.C. Cir. 1998) (citing *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985)). Even if the challenge was not ripe when the permit was issued, XXX waived review by not seeking it during the statutory time period. The court of appeals in *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985), examined the relationship between timeliness and ripeness. *Id.* at 912. Timeliness requirements are jurisdictional. *See id.* at 911. Such requirements are "a deliberate congressional choice to impose statutory finality on agency orders which we may not second-guess." *Id.* They are designed to avoid judicial review of "disputes which Congress has determined have been raised too late and to protect agencies from endless judicial interference with formalized administrative policy." *Id.* at 913. The court of appeals warned "petitioners of the wisdom of filing protective petitions for review during the statutory period." *Id.* at 912 (citations omitted).

Ripeness issues involve the "competence of the courts to resolve disputes without further administrative refinement of issues." *Id.* Ripeness is generally a look forward to determine the impact of postponing review. *See Eagle-Picher*, 759 F.2d at 913. Courts rarely look backward to determine whether a court would have found the issue ripe for review had it been brought during the statutory period. *See id.* The court of appeals explained the reluctance of courts to perform a retrospective ripeness analysis:

Courts are simply not well-suited to answering hypothetical questions which involve guessing what the court might have done in the past Furthermore, if we were to routinely conduct retrospective ripeness analysis where a late petitioner offers no compelling justification for not having filed his claim in a timely manner, we would wreak havoc with the congressional intention that repose be brought to final agency action.

Id. at 914. XXX's challenge to the permit condition is not timely. XXX should have petitioned for review during the statutory time period. Of course, a court may have found the issue was not ripe for review at that time. But if the court had heard the issue and determined it was not ripe, XXX would have preserved its right of review when the issue became ripe. Instead of bringing its challenge during the statutory period, XXX substituted its own judgment of ripeness for that of the court and concluded that the challenge was not ripe for review because it required a more concrete factual context, such as when an enforcement action is brought. XXX is asking the Court to perform a retrospective ripeness analysis to validate XXX's judgment that the court would have found the issue unripe if the action had been brought during the statutory time period. Courts are reluctant to do such an analysis because it violates the policy behind the statutory time limitations. There are no compelling justifications for XXX's failure to bring a timely challenge.

B. The Issue Was Not Ripe When The Permit Was Issued And Should Be Heard Now.

The court may only hear issues which are ripe. Judicial review of an issue which is ambiguous should be postponed until there is a concrete factual context. If a claim is unripe during the statutory period and the statutory time period is the only time a challenge may be brought, petitioners would be denied their day in court. Therefore, the time limitation cannot begin to run until the issue becomes ripe. See *Baltimore Gas & Elec. Co. v. Interstate Commerce Comm'n*, 672 F.2d 146 (D.C. Cir. 1982). The time bar in CWA Section 509(b)(2) is consistent with this. CWA § 509(b)(2), 33 U.S.C. § 1369(b)(2) (1994). It operates only if review "could have been obtained" within the 120-day period. *Id.* If an issue was not ripe for review during that period and review, therefore, could not have been had during that period, the time bar did not operate. Petitioners did not have to seek review during the 120-day period, if issues were obviously not ripe, simply to preserve its claim once they become ripe. That result

would require two judicial actions which would be an obvious waste of judicial resources.

In the instant case, the issue of whether the permit condition is enforceable was not ripe for judicial review during the statutory time period of 120 days following issuance of the permit. The issue is ambiguous and requires a concrete factual record, which was not present when the permit was issued. The permit contains a blanket prohibition on violating state water quality standards. As a result of the ambiguity of the permit condition, XXX cannot know by how much it must limit its discharge of any particular pollutant or predict the prohibition would subject it to standards promulgated under the SDWA, which was intended to regulate drinking water utilities rather than prevent the contamination of groundwater. In addition, the prohibition requires compliance with state law water quality standards which may become effective after the permit is issued. At the time of permit issuance, XXX cannot anticipate every water quality standard it may challenge. Therefore, XXX argues the statutory time period should not have began to run when the permit was issued. Enforcement of the permit condition provides a concrete factual context on which the court may base its decision. When the condition is enforced, the court may specifically see how the permit condition is applied and how it effects petitioners. Postponing the start of the statutory time period until the court has a concrete factual context for determination is consistent with the purpose of the time limitation.

1. The Clean Water Act And Precedent

Under the CWA, only particular actions by the Administrator are subject to judicial review in the courts of appeals, including the issuance or denial of a permit. *See* CWA § 509(b), 33 U.S.C. § 1369(b) (1994). Challenge to the issuance or denial of a permit must be brought within 120 days of the determination, promulgation, issuance, denial, or approval, or the opportunity to do so will be lost. *See* 33 U.S.C. § 1369(b)(2) (1994). However, the time bar of CWA Section 509(b)(2) has not been strictly construed. Courts have post-

poned review of actions of the Administrator when a more concrete factual record is required.

In *American Iron and Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997), several associations and an environmental group petitioned for judicial review of the EPA's Final Water Quality Guidance for the Great Lake System. *Am. Iron*, 115 F.3d at 999. American Iron and Steel Institute (AISI) challenged the substance of the EPA guidance. *See id.* One such challenge was to EPA's interpretation of the Act that the return of a pollutant to the waterbody from which it was taken (referred to as an "intake pollutant") was an "addition" of the pollutant to the waterbody. *Id.* The court held this issue was not ripe for review. *See id.* Whether the discharge of an intake pollutant can be considered an "addition" "cannot be answered in the abstract . . . [t]he court must consider a variety of factors." *Id.* The American Iron and Steel Institute maintained that the "interpretation [of the statute regarding 'addition'] can be adjudged erroneous quite apart from any factual considerations." *Id.* However, the court held that it "would need to know how those provisions operate in practice in order to address the petitioner's claims that the EPA has acted in a way that is arbitrary or capricious or violates the petitioner's due process rights." *Id.* Other courts have also found provisions relating to intake pollutants are unripe for review until they are implemented in a particular factual setting. *See Natural Resource Defense Council, Inc. v. EPA*, 859 F.2d 156, 204-205 (D.C. Cir. 1988) (holding that the legal challenge is bound up in the more fact-dependent claims 'enough to tilt the balance in favor of finding not only the fact-dependent claims, but also the more purely legal one, unripe') (citations omitted); *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978) regarding whether or not permittee may receive credits for pollutants present in the intake water, the court stated the issue "may have links to the concededly fact-dependent [issues] that we cannot now fully perceive"). These courts applied the ripeness test despite the statutory time limitation. *See also Trustees for Alaska v. EPA*, 749 F.2d 549, 556 (9th Cir. 1984) (judicial review of expired permits where "the fact that the original per-

mit had expired was held to be irrelevant because of the "highly reasonable expectation that petitioners will be subjected to the same action again") (citations omitted).

The Seventh Circuit Court of Appeals found that a challenge to a water quality standard anti-degradation regulation was unripe. See *Commonwealth Edison Co. v. Train*, 649 F.2d 481, 482 (7th Cir. 1980). Anti-degradation regulations prevent states from adopting water quality standards which are less stringent than water quality standards that presently exist, protecting water quality from being degraded. See 40 C.F.R. § 130.17(e) (1980). In *Edison*, the court recognized that an anti-degradation regulation, which requires minimum water quality criteria be included in a state program did not impose any obligations on the utilities challenging the regulations. *Edison*, 649 F.2d at 484. "Rather, the regulation is directed at states and requires the states to adopt and implement a policy which may or may not result in a coercive order against utilities in the future." *Id.* The court held that it "is impossible to predict, however, if at all, these minimum criteria will affect utilities It is impossible to determine at this point with any degree of certainty whether the utilities will be injured by future action by the states." *Id.*; see also *Appalachian Power Co. v. EPA*, 566 F.2d 451 (4th Cir. 1977) (concluding that review of regulation regarding cooling water intake structures would be speculative and premature until in a permit).

The fact that other courts have postponed judicial review of agency action under the CWA, despite the statutory time period, supports this Court postponing review in the instant case. The court in *Edison* postponed review because it was impossible to predict "with any degree of certainty" how the petitioners would be affected by the provision during the statutory time period following promulgation of the regulation. *Edison*, 649 F.2d at 484. Similarly, in *American Iron*, the court needed "to know how the [provision operates] in practice." *American Iron*, 115 F.3d 979, 999 (D.C. Cir. 1997). In the instant case, the blanket provision that no state water quality standards be violated has the same uncertainty as the water quality standard anti-degradation provisions ad-

dressed by the courts in *Edison* and *American Iron and Steel Institute*. It is not clear how XXX would be affected until the permit condition “operates in practice.” The permit condition prohibits discharges, which violates state water quality standards. However, state water quality standards have no meaning in the abstract. They consist of particular uses and criteria to support those uses. They are normally implemented by allocating the burden of achieving the criteria among discharges contributing to the failure of achievement and placing the allocations as effluent limitations in permits. The permit at issue is a case in point. It could not have been anticipated during the 120-day period after permit issuance that the requirement to meet water quality standards would be asserted to mean not violating a standard promulgated under another statute and intended for another purpose, the regulation of drinking water utilities by establishing standards to be applied at the tap, not in the river.

2. Other Statutes And Precedent

Congress has specifically established statutes of limitations for judicial review of agency actions in other statutes. See Orders of Federal Agencies; Review, 28 U.S.C. § 2344 (1994); CAA §307(b), 42 U.S.C. § 7607(b) (1994); Oil Pollution Act (OPA) § 1017(a), 33 U.S.C. § 2717(a) (1994). Nevertheless, courts have proceeded with a ripeness analysis to address issues arising under these statutes.

The EPA promulgated “delegation” regulations, pursuant to the CAA, which articulated procedures to be used in determining whether or not to approve state rules or programs. See *Louisiana Evtl. Action Network v. Browner*, 87 F.3d 1379, 1380 (D.C. Cir. 1996). In *Louisiana Environmental Action Network*, petitioners challenged the delegation regulations. *Id.* According to the CAA, challenges to a rulemaking must be made within 60 days of the rulemaking. See 42 U.S.C. § 7607(b). The petitioners brought the action within the statutory time period. *Louisiana Evtl. Action Network*, 87 F.3d at 1385. However, the court noted that other courts have postponed review when there is a need to wait for “a rule to be applied [to see] what its effect will be.” *Id.* (citing

Diamond Shamrock Corp. v. Costle, 580 F.2d 670, 674 (D.C. Cir. 1978)); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56-59 (1993) (noting that mere promulgation of an agency regulation does not make it ripe for challenge). The court stated that because it could not "ascertain or predict the specific practical problems that the trade associations, specifically, the Clean Air Implementation Project, the Chemical Manufacturers Association, and the American Automobile Manufacturers Association, Inc. (collectively (CAIP)) and its members might face or that might need remedy until the approval of some state's requirement or some other occurrence cements the application and the effect of the challenged delegation rules, [the court could not] review CAIP's claim now." *Louisiana Evtl. Action Network*, 87 F.3d at 1384. "If federal enforcement of state-adopted regulations provide the grounds necessary for proper judicial review in this type of case, then those grounds cannot have arisen until at least some problematic state regulation has received Environmental Protection Agency approval necessary for such federal enforcement." *Id.*

In *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998), the petitioner challenged an EPA rule permitting use of credible evidence to prove or disprove violations of the CAA. *Clean Air Implementation Project*, 150 F.3d at 1201. The court noted the time limitation in the CAA and stated that the provision does not require "the court to adjudicate issues raised in a pre-enforcement challenge to a rule unless those issues are suitable for decision. If the issues are not of that nature, we will dismiss the petition as unripe." *Id.* at 1204 (citing *Louisiana Evtl. Action Network*, 87 F.3d at 1385); see also *Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 146 F.3d 942, 947 (D.C. Cir. 1998). A challenge may be raised when the issue becomes ripe, for example, in an enforcement action. *Clean Air Implementation Project*, 150 F.3d at 1204. Despite the statutory time period, the petitioner may raise those issues when they become ripe. *Id.* (citing *Louisiana Evtl. Action Network v. Browner*, 87 F.3d at 1381); *Baltimore Gas & Elec. Co. v. Interstate Commerce Comm'n*, 672 F.2d 146 (D.C. Cir. 1982). The court recognized that it is

sometimes necessary to see how a rule applies in a particular situation. See *Clean Air Implementation Project*, 150 F.3d at 1206. The court proceeded to note that judicial review would benefit from a more concrete and factual context. See *id.* at 1205, (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)). The court did not find that the petitioners would be unprotected. "If the credible evidence rule has in fact altered these standards, petitioners can raise that as a defense in an enforcement action." *Id.* In the instant case, the challenged permit condition requires a more concrete factual context. As in *Clean Air Implementation Project*, 150 F.3d 1200 (D.C. Cir. 1998), XXX should be able to raise the challenge as a defense in an enforcement proceeding. *Id.* at 1205; See also *Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 146 F.3d 942, 946 (D.C. Cir. 1998) (concluding that despite 60-day statutory review period for orders of the Surface Transportation Board under 28 U.S.C. § 2344, challenge to reasonableness of railroad rates was not ripe because "judicial resolution of all of petitioner's challenges would benefit from a concrete case"); *Baltimore Gas & Elec. Co. v. Interstate Commerce Comm'n*, 672 F.2d 146 (D.C. Cir. 1982) (finding that despite 60-day statutory review period of federal agency orders under 28 U.S.C. § 2344 the challenge was not ripe for review, stating a "time limitation on petitions for judicial review, it should be apparent, can run only against challenges ripe for review"); *General Elec. Co. v. United States Dep't of Commerce*, 128 F.3d 767, 774 (D.C. Cir. 1997) (holding that despite a 90-day statutory time period under the Oil Pollution Act, §§ 1001-7001, (33 U.S.C. §§ 2701- 2761, the industry petitioners challenge to NOAA regulations established pursuant to the Oil Pollution Act was unripe because the court lacked "both the factual record and the detailed findings").

XXX should not be required to challenge the issuance of a permit in order to preserve the issue, if the challenge is clearly unripe. Requiring every petitioner to file their challenge during the statutory period, even though the issue was unripe, would violate the policy of conserving judicial resources. Moreover, the bar on obtaining judicial review of permit provisions during an enforcement action in CWA Sec-

tion 509(b)(2) only applies to actions for which review "could have been obtained" during the statutory time period. Since courts cannot review issues which are unripe, review could not have been obtained during the statutory time period.

III. WHETHER THE QUESTION OF ENFORCEABILITY OF WATER QUALITY STANDARDS WITHOUT CRITERIA IS A MATTER OF STATE OR FEDERAL LAW.

State water quality standards consist of a state designated use for a particular waterbody and state developed criteria to assure that use. *See* CWA § 303(c), 33 U.S.C. § 1313(c) (1994). When a state adopts or revises a standard, it must be submitted to the Administrator for approval. *See id.* If the Administrator finds the standard is not consistent with the CWA, the Administrator notifies the state, which must then change the standard. *See id.* If the state fails to change the standard, the Administrator will promulgate the standard. *See id.*

When EPA administers the permit program, a permit applicant must first obtain certification from the state that the permit will not violate CWA Sections 301, 302, 303, 306, and 307 of the CWAs or appropriate requirements of state law. *See* CWA § 401(a), (d), 33 U.S.C. §§ 1341(a), (d) (1994) CWA Section 303 relates to state water quality standards. No permit can be granted if certification is denied. *See* CWA §§ 401(a), (d), 33 U.S.C. §§ 1341(a), (d) (1994). A state may withhold certification unless conditions are met. *See* CWA § 401, 33 U.S.C. § 1341. Any certification condition to assure compliance with CWA or state law requirements must become a condition in a federal permit. *See* CWA § 401(d), 33 U.S.C. § 1341(d). In addition, CWA Section 301(b)(1)(C) also requires permits to meet water quality standards as well as other provisions of state law, independently of the conditions imposed in a certification. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994).

Therefore, state laws are incorporated into federal permits as a matter of federal law. Federal NPDES permits are

enforceable in citizen suits in the district courts. See CWA § 505(a), 33 U.S.C. § 1365(a) (1994). The question becomes whether to apply state or federal law when interpreting conditions implementing state water quality standards in federal permits. If the enforceability of water quality standards is interpreted by state law, then, in the instant case, the designated use alone would not be enforceable. The Supreme Court of New Union in *Prentice v. Department of Env'tl. Quality*, 435 N.U. 875 (1989) (hypothetical case used for the Moot Court Competition), held that "designated uses are merely goals, to be implemented and given meaning by subsequent administrative actions. As goals, the uses themselves are not enforceable." However, if the enforceability of water quality standards is interpreted by federal law, the opinion of the Supreme Court of New Union regarding the water quality standards is essentially irrelevant.

XXX and New Union argue that the issue of whether water quality standards without criteria are enforceable is a question of state law. As such, the holding of the Supreme Court of New Union, that water quality standards are not enforceable without criteria, is controlling. See *Prentice*, 435 N.U. 875 (1989) (hypothetical case). XXX and New Union claim that the issue is a question of state law because it interprets state regulations based on a state statute. The provision was incorporated into the permit as a condition of state certification. Therefore, the EPA and the citizens are bound by the state court's interpretation.

FOR, on the other hand, claims that the issue is a question of federal law. FOR claims that the state water quality regulations must be approved by the EPA as consistent with the CWA and, according to the United States Supreme Court, are thereby "federalized." See *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). In the instant case, the permit provision is boilerplate in EPA permits, without regard to certification. The EPA would have, and was required, to include the provision in the permit regardless of the state certification condition. Even if the court determines that the provision was incorporated as a condition of state certification rather than EPA initiative, the regulations are incorporated into federal

permits and enforceable through the CWA, a federal statute. Therefore, the court is not bound by the state court's interpretation.

A. Enforceability Of State Water Quality Standards
Without Criteria Is A Matter Of Federal Law.

1. The Clean Water Act And Precedent

a) The Statute

CWA Section 301(a), 33 U.S.C. § 1311(a) (1994), prohibits discharges unless they comply with specified sections of the CWA. CWA Section 302, 33 U.S.C. § 1312 (1994), relating to *federal* water quality standards, is one of the sections, although Section 303, 33 U.S.C. § 1313 (1994), relating to *state* water quality standards, is not one of those specified sections. In addition, EPA must incorporate water quality standards as permit conditions under CWA Section 301(b)(1)(C), as a matter of *federal* law. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994). The provision at issue in the instant case is boilerplate EPA language, incorporated into every permit issued by the EPA region under federal law. A permit cannot be issued unless the applicant receives Section 401 certification. Such certification assures that the permit will satisfy requirements specified in the CWA, as a matter of federal law, including Section 303, 33 U.S.C. § 1313. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1994). The certification requirements must be incorporated into a federal license or permit. *See* CWA § 401(d), 33 U.S.C. § 1341(d) (1994).

Even if the provision prohibiting violations of state water quality standards had its origin in state law, the federal interpretation must control. CWA Section 301(b)(1)(C) requires the EPA to comply with water quality standards established under both state and federal law. 33 U.S.C. § 1311(b)(1)(C). Similarly, the certification under Sections 401(a) and (d) requires states to certify requirements necessary to meet water quality standards under both federal and state law. 33 U.S.C. §§ 1341 (a), (d). The use designation in the instant case falls under both state and federal law. The State of New

Union has interpreted the use to be unenforceable without accompanying criteria. However, the Supreme Court of the United States has stated that water quality standards without criteria are enforceable. See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 717 (1994), *aff'd* 849 P.2d 646 (Wash. 1993) [hereinafter *Jefferson County II*]. The CWA preserves state law only if it is more stringent than the federal law. CWA § 510, 33 U.S.C. § 1370 (1994). In this case, the state interpretation is less stringent and the federal interpretation must prevail.

b) Precedent

In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Supreme Court addressed whether or not the interpretation of an Oklahoma water quality standard was a matter of state or federal law. *Arkansas v. Oklahoma*, at 92. The state regulation provided that “no degradation [of water quality] shall be allowed’ in the upper Illinois River.” *Id.* at 95 (citations omitted). The Supreme Court held that the relevant federal agency’s interpretation of a state water quality standard should be given deference. See *id.* at 110. The EPA requires permits to comply with the applicable water quality requirements of any affected states. See 40 C.F.R. § 122.4(d) (1998); *Arkansas v. Oklahoma*, 503 U.S. at 109. The Supreme Court recognized that this regulation “incorporates into federal law those state-law standards the Agency reasonably determines to be ‘applicable.’” *Id.* at 109. Such water quality standards are “part of the federal law of water pollution.” *Id.*

The holding in *Washington Department of Ecology v. PUD No. 1 of Jefferson County* [hereinafter *Jefferson County I*], 849 P.2d 646 (Wash. 1993), *aff'd*, 511 U.S. 700 (1994) is contrary to the holding in *Arkansas*. In *Jefferson County I*, the Supreme Court of Washington addressed whether the Federal Power Act (FPA), 16 U.S.C. §§ 792-828(u) (1993), pre-empts state water quality standards. The State of Washington granted a CWA Section 401 certification to an applicant for a license under the Federal Power Act to build a dam, but conditioned certification upon maintenance of a specified minimum streamflow. *Jefferson County I*, 849 P.2d at 648.

The state condition regulating streamflow was challenged as being pre-empted by the Federal Power Act which requires applicants to first secure permits from the Federal Energy Regulatory Commission. *See id.* at 655. The court recognized that water quality standards have a hybrid character, being required by federal law, yet issued and interpreted by state law. *See id.* at 654. Hence, review of the certification is left to the state court. *See id.* at 653. The decision could be interpreted as recognizing water quality standards as state law to be interpreted by a state court. However, the decision in *Jefferson County I* is inapplicable because the court interpreted a state law requirement as applied to a license issued under the Federal Power Act, the purpose of which is to promote hydrologic power, not to protect water quality. The purpose of the certification requirement in that case is to assure that federal and state water quality concerns are not ignored in the effort to develop power sources. Interpreting state water quality standards as a matter of state law in that context offends the Federal Power Act no differently than requiring power projects to meet environmental standards. On the other hand, the very purpose of the CWA and of CWA permits is to achieve water quality standards and the CWA itself, as a matter of federal law, establishes the means of doing so. To interpret water quality standards as matters of state rather than federal law in that context ignores the Supremacy Clause.

2. The Clean Air Act SIPs And Precedent

State water quality standards are analogous in some ways to the Clean Air Act State Implementation Plans (SIPs). *See* CAA § 110, 42 U.S.C. § 7410(a)(1) (1994). Under the CWA, a waterbody is designated for a particular use, criteria are developed to achieve that use, and limitations are developed in permits for individual pollution sources to meet the criteria. *See* CWA § 303, 33 U.S.C. § 1313 (1994). These water quality standards are enforceable when incorporated into NPDES permits. *See* CWA § 402, 33 U.S.C. § 1342 (1994). Similarly, under the Clean Air Act, the statute itself establishes the use for air, National Ambient Air Quality

Standards (NAAQS) are developed for pollutants as criteria to achieve the use, and state implementation plans are developed to secure pollution reduction from individual sources to meet the criteria. CAA § 109, 42 U.S.C. § 7409 (1994). The courts have generally held that once a SIP is approved by the EPA, its requirements are “binding as a matter of federal law.” *Oregon Envtl. Council v. Oregon Dep’t of Envtl. Quality*, No.CIV.91-13-FR, 1992 WL 252123 *1 (D. Or. Sept. 24, 1992); see also *Navistar Int’l Transp. Corp. v. EPA*, 858 F.2d 282 (6th Cir. 1988); *EPA v. AM Gen. Corp.*, 808 F. Supp. 1353 (N.D. Ind. 1992); *United States v. General Motors Corp.*, No. 87-2068-ML, 1988 WL 82247 (D. Mass. May 16, 1988), *rev’d on other grounds*, 876 F.2d 1060 (1st Cir. 1989) (finding that once approved, SIP is enforceable under both State and federal law); *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491 (10th Cir. 1994) (stating that SIP has force and effect of federal law); *United States v. Louisiana Pac. Corp.*, 908 F. Supp. 835 (D. Colo. 1995); *Olson v. Arizona*, 803 P.2d 448 (Ariz. Ct. App. 1990). The SIP requirements must be approved by the EPA as being consistent with the Clean Air Act, even though SIP requirements stand as state regulations promulgated by state agencies, under the authority of state statutes. Therefore, the EPA must necessarily interpret each requirement and it is the federal interpretation of the requirement that is determined to be consistent with the Clean Air Act. Similarly, state water quality standards must be approved by the EPA as being consistent with the CWA. It is the federal interpretation of each state water quality standard that is considered when determining whether the water quality standard is consistent with the CWA .

In *American Lung Association of N.J. v. Kean*, 670 F. Supp. 1285 (D.N.J. 1987), the court refused to give deference to a state’s interpretation of its own SIP requirements. *Id.* at 1291. Plaintiffs, non-profit associations, claimed that the SIP required the state to perform “specific rulemaking and implementation steps” which the state had not done. *Am. Lung*, 679 F. Supp. at 1290. The state interpreted the SIP only to require a study of the feasibility of particular strategies and to implement only those strategies which were determined to

be feasible. *See id.* The court refused to give deference to the state's interpretation, holding that, at least when the Clean Air Act requires the state to design the regulations that bind it, the state should not be afforded the "opportunity to define away attempts at regulatory enforcement." *Id.* at 1291.

B. Enforceability Of Water Quality Standards Without Criteria Is A Question Of State Law.

1. The Clean Water Act

The CWA contains two sections that indicate state water quality standards are state law and should be given state rather than federal interpretation. First, Section 301(b)(1)(C) requires the achievement of:

any more stringent limitation, including those necessary to meet *water quality standards*, treatment standards, or schedules of compliance, *established pursuant to any State law or regulations* (under authority preserved by section 1370), or any other Federal law or regulations, *or required to implement any applicable water quality standard established under this chapter.*

CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994) (emphasis added). The fact that the provision mentions both "state law" and "water quality standards" might suggest that "water quality standards" are not "state law." *Id.* However, since the use of "water quality standards" twice cannot be redundant, the phrases "water quality standards . . . established pursuant to state law" and "water quality standard[s] established pursuant to this chapter" must distinguish the origins of the water quality standards. *Id.* A state water quality standard is established by the state and a "water quality standard established pursuant to this chapter" is a standard established by the Administrator under CWA Section 302, 33 U.S.C. § 1312 (1994). Therefore, the Administrator is required to include in the permit more stringent limitations based on state water quality standards.

Second, the EPA cannot issue a permit without state certification. *See* 40 C.F.R. § 122.4(b) (1998). The EPA is re-

quired to incorporate certification requirements into a permit unless doing so would be inconsistent with the CWA. *See* CWA § 401, 33 U.S.C. § 1341 (1994). In that respect, such state requirements are not reviewable by the EPA and are automatically included in the permit. Petitioners must challenge the actions of the certifying state agency in state court, not the federal permitting agency in federal court. The EPA's only participation in including a water quality standard in a permit is to determine whether or not the standard is consistent with the CWA. Therefore, substantive and procedural state law should be used to interpret the water quality standard. Any review or appeals of "limitations and conditions attributable to state certification shall be made through the applicable procedures of the state and may not be made through the procedures in [40 C.F.R. Part 124]." 40 C.F.R. 124.55(d) (1998). The conditions of certification must then be incorporated into permits. *See* CWA § 401(d), 33 U.S.C. § 1341(d).

2. Precedent

The Second Circuit Court of Appeals addressed the question of whether water quality standards are state or federal law, in *American Rivers, Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99 (2d Cir. 1997). The federal permit-issuing agency, Federal Energy Regulatory Commission (FERC), refused to incorporate the certification requirements in the federal permit that it issued to the applicant. *See Am. Rivers*, 129 F.3d at 103. FERC claimed that, as a matter of federal law, the specific requirements were beyond the scope of the state's authority under the CWA. *See id.* The court of appeals held that FERC had no choice but to include the condition certified by the state. *See id.* at 107. The state agency's action in issuing the certification was being appealed and only a state court could hear the appeal.

In *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041 (1st Cir. 1982), petitioners challenged the refusal of the Administrator of the EPA to issue an NPDES permit to a particular company. *Roosevelt Campobello*, 684 F.2d at 1044. The state provided certification re-

quiring various state law provisions be included in the permit. *See id.* An Administrative Law Judge (ALJ) ordered the EPA to issue the permit without the conditions. *See id.* The First Circuit Court of Appeals reversed, holding that the "EPA has interpreted [CWA § 401(d)] to preclude federal agency review of state certification" and that "review and appeals of limitations and conditions attributable to state certification shall be made through the applicable procedures of the state and may not be made through procedures established in federal regulations." *Id.* at 1056; 40 C.F.R. § 124.55(e) (1998). The court recognized that courts have consistently upheld the interpretation, holding that challenges to a state's certification should be brought in the state court. *Id.* at 1056. The federal courts and agencies do not have authority to "review the validity of requirements imposed under state law or in a state's certification." *Id.*; *see also Keating v. Fed. Energy Regulatory Comm'n*, 927 F.2d 616 (D.C. Cir. 1991) (upholding validity of a state-certification was a matter of state law).

In *United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989), defendants allegedly bulldozed wetlands protected by Section 404 of the CWA. *Marathon Dev.*, 867 F.2d at 97. Defendants argued that a National Permit under 30 C.F.R. § 330.5(a)(26)(1986) applied and, therefore, they did not need to obtain an individual permit. *See Marathon Dev. Corp.*, 867 F.2d at 99. The court rejected this argument. The National Permit was not applicable because Massachusetts had denied CWA Section 401 certification, required for both individual and general permits. *See id.* The court held that the proper forum for review of state certification is "state court, rather than federal court, because a state law determination is involved." *Id.* at 102.

The decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), holding that state regulations were federal law, is distinguishable. The court's holding was limited to state water quality standards that affect another state. *Id.* at 110. The court stated "we recognize that, *at least insofar as they affect the issuance of a permit in another State*, the Oklahoma standards have a federal character." *Id.* (emphasis added).

Therefore, the opinion does not resolve whether or not water quality standards that do not affect another state are federal or state law.

Furthermore, analogies to the Clean Air Act are misplaced. The CWA designates a goal of fishable, swimmable waters, but the states designate the uses for their waterbodies. Under the CAA, on the other hand, Congress has established the designated use is public health. CAA § 109(b), 42 U.S.C. § 7409(b) (1994). Moreover, under the CAA, the federal government designates the criteria to meet the use, the NAAQS, whereas the states designate the criteria under the CWA. *See* CAA § 109(a), 42 U.S.C. § 7409(b) (1994); CWA § 303, 33 U.S.C. § 1313 (1994). The different roles the federal and state governments play under the Clean Air Act and the CWA prevent any analogies from being drawn between the two regarding the federal or state character of standards.

IV. WHETHER OR NOT A PERMIT CONDITION GENERALLY REQUIREING COMPLIANCE WITH STATE WATER QUALITY STANDARDS IS ENFORCEABLE WITHOUT BEING TRANSLATED INTO A SPECIFIC LIMITATION.

Before 1972, most states had water quality standards. *See* Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1178 (1983). States were required to develop water quality standards for approval by the Department of the Interior. *See id.* The standards themselves were essentially the basis of the federal government determining whether a violation had occurred. *See id.* The government had to identify the source of pollution and prove whether or not the source had caused the violation of the water quality standard. *Id.* at 1179. Difficulties in proving which among many pollution sources on a waterbody caused a violation of its water quality standards proved the earlier legislation inadequate to control pollution. *Id.*

The water pollution control approach clearly had to be changed. The Senate wanted to abolish state water quality standards altogether and replace them with federal standards based on technology. *See Gaba, supra*, at 1183. The House of Representatives wanted to keep water quality standards and control with the states. *See id.* The final CWA accomplished both. *See id.* at 1185. The new CWA provided dischargers and enforcement agencies with federal technology based standards, more guidance on water quality standards, a permitting program run by EPA or the states, an effective federal enforcement provision, and deadlines for achieving standards. *Id.* The intention was to use technology based standards in the first instance and make permit limitations more stringent if necessary to achieve water quality standards. *See id.*

States are required to designate a use for each waterbody and develop criteria on how clean the water must be to supports that use. *See CWA* § 303(b), 33 U.S.C. § 1313(b) (1994). The state must determine the TMDL of a pollutant that the receiving waterbody can tolerate to achieve criteria. *See CWA* § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (1994). Once the TMDL is determined, pollution reduction is allocated among sources, by translating the necessary reduction into numeric pollution discharge limitations in individual permits for specific point sources. *See Gaba, supra*, at 1175. Water quality standards are enforceable once they are adopted in permits as effluent limitations based on the water quality standards and allocated among sources. *See id.* In the instant case, the state has adopted no criteria for selenium. Nor has it determined a TMDL for selenium in the river, indeed without a criterion, it could not. Nor has it developed a wasteload allocation between XXX and Sigma Chemical, the larger source of selenium identified on the river.

The House Report evidences the intention of Congress to establish technology based standards as the primary means of regulation, while retaining water quality standards as a backup strategy where more stringent control is necessary. The House report stated that the federal water quality standards section “provides authority to supplement any effluent

limitation . . . in the event such [technical standards] are inadequate to protect public water supplies . . . [The State water quality standards section] continues the use of water quality standards.” H. R. Rep. No. 92-911, at 104 (1972). The Report added that:

even though all point sources must . . . as a minimum, meet the requirements of subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 [regarding technology based effluent limitations] all point sources could be required to meet a more stringent effluent limitation consistent with water quality standards of the receiving waters if the effluent limitations set pursuant to subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 are inadequate to meet those water quality standards.

Id. at 105.

The earlier 1965 CWA had established water quality standards as the control mechanism. *See* S. Rep. No. 92-414 at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N 3668, 3675. The states were supposed to designate water uses and types and amounts of pollutants to be tolerated. *See id.* The Senate Report noted that the water quality standards program was not successful. *See id.* The problem with water quality standards is that they “often cannot be translated into effluent limitations — defensible in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.” *Id.* Water quality standards failed because they were not specific enough for people to know how to act. *Id.* The Senate resolved to abandon the water quality standards and establish discharge requirements based on what technology could achieve. *See id.* “The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality.” *Id.* Permits containing technology-based standards reduced requirements to meaningful and understandable limitations.

XXX and New Union maintain that the legislative history demonstrates that the CWA was intended to provide certainty to permittees. Indeed, Congress stated that it was

“attempting to . . . provide law that can be administered with certainty and precision.” 117 Cong. Rec. 17,404 (1971). An unqualified permit condition that XXX simply meet water quality standards is inconsistent with this congressional intent. In order to achieve certainty, a five step process is followed: the state designates a use; criteria is established to support that use; a TMDL is determined; the waste load for the pollutant is allocated among the polluting sources; and effluent limitations are included in permits based on the waste load allocations. *See Gaba, supra*, at 1168. XXX and New Union argue that only the first step was completed. Without criteria and a TMDL for selenium, a waste load allocation can not be made between XXX and Sigma Chemical, the other discharger of selenium, one mile upstream. If a waste load allocation is not reduced to an effluent limitation in a permit, XXX does not know how much selenium must be reduced from in its discharge and how much will be reduced from Sigma Chemical. Therefore, to enforce the water quality standards, it is necessary to reduce them to numeric or specific effluent limitations in the permit.

FOR claims that it is not necessary to follow the five step process to implement water quality standards. Although the five step process may be preferable, including in the permit a condition prohibiting violations of the state water quality standards is also a valid method. In fact, narrative standards are routinely enforced without allocation or reduction to specific numbers. FOR relies on precedent to support its claim that water quality use designations are enforceable without applying the five step process reducing criteria to effluent limitations. *See Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995); *Jefferson County II*, 511 U.S. 700 (1994), *aff'g* 849 P.2d 646 (Wash. 1993). Moreover, if the court does require criteria for selenium, the use essentially has one in the MCL for selenium established under the SDWA.

A. A General Condition Requiring Compliance With Water Quality Standards Is Enforceable.

1. The Clean Water Act

As previously mentioned, CWA Section 505, 33 U.S.C. § 1365 (1994), allows citizens to bring an action to enforce violations of an “effluent standard or limitation.” *Id.* This section defines “effluent standard or limitation” as, inter alia, a limitation under Section 301, certification under section 401, or a section 402 permit “condition.” *See* CWA § 505(f)(5), 33 U.S.C. § 1365(f)(5). As we saw above, Section 301(b)(1)(C) includes state water quality standards. 33 U.S.C. § 1311 (1994). Certification, itself, is composed of conditions based, in part, on state water quality standards. A condition in XXX’s permit requires compliance with state water quality standards. Therefore, the general permit requirement for compliance with state water quality standards is enforceable.

2. Precedent

The Supreme Court, in *Jefferson County II*, 511 U.S. 700 (1994), *aff’d*, 511 U.S. 700 (1994), analyzed the enforceability of a water quality standard use designation, in the absence of the usual translation of the use to a criterion, to a waste load allocation, and ultimate numerical quantification. In recognizing that the CWA sets forth two components for water quality standards, the use and criteria, the Court stated that “the language of Section 303 [regarding state water quality standards] is most naturally to be read to require that a project be consistent with both components.” *Id.* at 714. The Court added that “under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable standard.” *Id.* The Supreme Court also noted that the EPA does not require uses to be protected solely through numerical criteria. *See id.* Rather, the regulations provide that “when criteria are met, water quality will generally protect the designated use.” *Id.*; 40 C.F.R. § 131.3(b) (1998). The Court interpreted the EPA regulations to establish that criteria alone will sometimes be insufficient to protect a use. *See Jefferson County II*, at 714.

The Court determined "the petitioner's attempt to distinguish between uses and criteria loses much of its force in light of the fact that the CWA permits enforcement of broad, narrative criteria based on, for example, 'aesthetics.'" *Id.* at 716. If the Court were to find otherwise, then, if a particular criterion were missing or insufficient, the state would have to allow certain activity, even if it was inconsistent with the use. *See id.* at 717. Criteria are intended to fulfill sufficient water quality protection requirements. However, they "cannot reasonably be expected to anticipate all the water quality issues arising from every activity" that affect a state's waterbodies. *Id.* States should not be limited to enforcing only the criteria component. *See id.*

In *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), an environmental group sued for violation of a water quality standard use from combined sewer overflows. *Id.* at 980. The permit prohibited discharges that would violate Oregon water quality standards adopted in Or. Admin. R. 340-41-445. *Northwest Envtl. Advocates*, 56 F.3d at 986. The environmental group alleged that the sewage discharges made the waterbody unsuitable for its designated use. *See id.* The defendant said the use was not enforceable in a citizen suit because Section 505 only allows citizens to enforce water quality standards which are translated into effluent limitations. *Id.* at 980. The court held the provision was enforceable because Congress did not intend to replace water quality standards with quantitative effluent limitations in permits. *See id.* at 986. Rather, such effluent limitations were intended to improve enforcement of whatever standards they are derived from, whether water quality standards or technology-based standards. *See id.*

In *Gill v. Schuette*, 19 F. Supp. 2d 1188 (W.D. Wash. 1998), the court enforced a water quality standard designated use despite the fact that water quality criteria had not been violated. The defendants operated a quarry that discharged silt into pond. *See id.* at 1191. The permit prohibited discharges that violated Washington State Water Quality Standards, which included various uses and a turbidity limitation. *See id.* at 1193. The plaintiffs claimed that silt, carried by a

stream to their pond, made the pond unsuitable for recreation or domestic uses. *See id.* at 1194. Plaintiffs alleged the discharge violated state turbidity limitations. *See id.* at 1193. The court did not find the turbidity limitations had been violated, but did find the pond was not suitable for the designated uses for water supply, recreation, and raising fish. *See id.* The court held “[i]n that regard, at least, defendants have violated the state standards condition in their permits.” *See id.*

In the instant case, the standard consists of drinking water use. Any discharge that causes the water body to be unsuitable for this designated use must be prohibited. The use is enforceable just as broad narrative criteria are enforceable. There is no difference between narrative criteria that state “no discharge of toxic pollutants in toxic amounts” and a use that requires “the waterbody must remain of drinkable quality.” *Id.* The water is not drinkable if it is harmful to human health. Because the defendant’s discharge causes it to exceed the MCL for selenium (established by EPA in a rulemaking under the SDWA), 40 C.F.R. § 141.51 (1998), defendant’s discharge therefore causes it to be harmful to humans and violates this use requirement.

Even if a numerical criteria were required, the water quality standard in the instant case would not fail. Although the permit does not contain an express numerical criteria, the use is accompanied by an ascertainable criteria. The SDWA, § 1412, 42 U.S.C § 300g-1 (Supp. II 1996), requires the Administrator to publish regulations regarding the maximum contaminant level for certain contaminants in drinking water to protect human health. The EPA has published, pursuant to the SDWA, 42 U.S.C § 300g-1, a MCL for selenium. *See* 40 C.F.R. § 141.51 (1998). Therefore, discharges that cause a level of concentration of selenium exceeding this level would cause the water body to be inappropriate for its designated use, and therefore would violate the water quality standard.

B. A General Condition Requiring Compliance With Water Quality Standards Is Not Enforceable.

1. The Clean Water Act

The CWA expressly states that water quality standards consist of both a use and criteria necessary to protect that use. CWA § 301, 33 U.S.C. § 1311 (1994). Therefore, a water quality standard can not exist without both components. The use is assured by meeting criteria necessary to protect that use.

Criteria are only the beginning of the enforcement process of water quality standards. Criteria are translated into specific limitations in a permit. This is particularly important if more than one discharger is contributing to the exceedance of a criterion for a particular pollutant. There are two reasons for reducing criteria to specific limitations in permits. First, Congress required that the CWA's environmental "controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred." 117 Cong. Rec. 17,404 (1971). Thus, the CWA emphasizes economic efficiency. Pollution sources are only required to spend that which is necessary to meet water quality standards. Pollution only needs to be reduced enough to meet water quality standards. In order to achieve this, a waterbody must have: 1) a designated use as well as criteria which determines how clean the water must be in order to meet the use; 2) a TMDL to determine the amount of a pollutant the waterbody can tolerate and still meet the criteria; 3) a waste load allocation to determine how much of a pollutant each source of must reduce in its discharge; and 4) the translation of the allocation into a permit effluent limitation. In the instant case, only the designated use, drinking water, exists. There is no criteria, TMDL, or waste load allocation for selenium. This is particularly important because XXX is not the only discharger of selenium into the Roaritan River. In fact, another discharger one mile upstream, Sigma Chemical, discharges twice as much selenium as XXX. Although there is no specific criteria, FOR claims when the MCL for selenium is exceeded; the use is violated. The concentration of

selenium does not violate the MCL until XXX's discharge is added to the selenium already discharged by Sigma Chemical. To require XXX to meet the nonexistent criteria for selenium is to place on it the entire responsibility for violating the criteria and the entire economic burden of meeting criteria, even though Sigma Chemical discharges twice as much selenium. This has been done with no rational explanation. This result is contrary to the letter and spirit of the water quality standards allocation process, which is designed to achieve water quality standards by sharing the burden of pollution reduction among those responsible for it on some rational basis.

The second purpose behind the permit program is to specify what is expected of the permit holder. *See* 117 Cong. Rec. 17,404 (1971). Congress attempted to provide for administration of the CWA with "certainty and precision." *Id.* There is an administrative process to develop permit limits. *See* S. Rep. No. 92-414 at 80 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746. A subsequent enforcement action merely reviews compliance with such permit limits. *Id.* "Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action . . ." S. Rep. No. 92-414 at 79 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745. In order to satisfy this goal of specificity, each pollutant to be regulated must be identified and quantitatively limited. In order for a source to determine the proper equipment and technology necessary to reduce a pollutant, the permit holder must know exactly how much of a pollutant it may discharge.

2. Precedent

The Second Circuit Court of Appeals in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994), held that the discharge of a pollutant which is not listed in the permit for that point source, does not violate the CWA. *Atlantic States Legal Foundation*, 12 F.3d at 357. The court noted that the "permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." *Id.* Pollutants may be discharged even if they

are not specifically listed in a permit as long as reporting requirements are complied with. *See id.* The CWA itself provides a "shield provision" which states that "compliance with a[n] [NPDES] permit shall be deemed compliance . . . with [the Act]." CWA § 402(k), 33 U.S.C. § 1342(k) (1994). The Court quoted an EPA interpretation in which it recognized that:

it is impossible to identify and rationally limit every chemical or compound in a discharge of pollutants . . . Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit.

Atlantic States Legal Foundation, 12 F.3d at 357 (citations omitted). If a polluter discharged a pollutant that was not listed in a permit but was detrimental to the receiving waterbody, the EPA could modify the permit to limit the pollutant. *Id.* at 358. Therefore, the purpose of the NPDES permit is to identify and limit those pollutants that are "most harmful." *Id.* at 357. The permit condition in the instant case, the designated use, does not prohibit any specific chemical or compound. Essentially any chemical or compound in concentrations high enough to deter people from drinking the water would be banned, despite the fact that the chemical or compound is not listed in the permit. This is inconsistent with the shield provision of the CWA, the interpretation of the EPA, and the opinion of the Second Circuit Court of Appeals.

In *Natural Resource Defense Council, Inc. v. EPA*, 16 F.3d 1395 (4th Cir. 1993), the court analyzed water quality standards. The court noted that the EPA's "duty, under the CWA and the accompanying regulations, is to ensure that the underlying criteria, which are used as the basis of a particular state's water quality standard, are scientifically defensible and are protective of designated uses." *Id.* at 1402. Therefore, while the nature of the designated use determines what criteria are needed to protect the use, the criteria are the basis for protection and enforcement of the use.

In *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (9th Cir. 1987), the court stated that "it is not the water quality standards themselves which are enforceable in Section 1311(b)(1)(C), but it is the limitations necessary to meet those standards, or required to implement those standards." *Natural Resources Council*, 834 F.2d at 850. Only permit limitations derived from water quality standards, not water quality standards themselves, are enforceable by citizen suits. There needs to be limitations to enforce the standards that a state sets. Water quality standards are not enforceable in citizen suits. As previously mentioned, once water quality standards are set, pollution reduction is allocated among sources. See Gaba, *supra*, at 1175. The allocation is generally translated into numeric discharge limitations in individual permits. See *id.* Only those limitations necessary to meet the standards are enforceable. The water quality standard in the instant case, the designated use, must be reduced to a discharge limitation for selenium in the permit for the point source. Only then can a violation for the discharge of selenium occur.

Furthermore, *Jefferson County II*, 511 U.S. 700 (1994), *aff'g* 849 P. 2d 646 (Wash. 1993), is inapplicable. There the state established the use designation of the fish propagation for the river. The state then in its certification established a minimum "flow" condition, essentially a numerical criterion for assuring the use of fish propagation to be placed in the applicant's permit. See *id.* In the present case, the state has not designated selenium as a criterion or adopted the MCL as a quantification for that criterion. See *id.* Instead, FOR, a non-governmental body, has done so or seeks a federal court to do so instead of the state administrative agency to whom the CWA has entrusted that task.

Moreover, in *Jefferson County II*, the Court did not interpret the terms of a CWA permit. Rather, it determined the state's power to condition certification of power production permits under another statute, the Federal Power Act. There is a vast difference between the two. Section 401 was enacted prior to 1972, when federal water pollution legislation did not have a permit or license requirement. The section's clear

purpose was to assure that federal permit and licenses, issued under other, non-water pollution control statutes, for projects potentially detrimental to the environment were conditioned to prevent damage to water quality. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1994) The whole purpose of CWA permits, of course, is to improve water quality. There is no process in the CWA to reduce water quality standards to numerical effluent limitations for uses other than CWA permits. There is such a process for reducing them to numerical limitations for CWA permits. Since Congress has provided that process for the very purpose at issue in this case, disregarding it would violate the statute.

Third, the Court's discussion of narrative criteria was dicta and is irrelevant. It was dicta in that case because the state imposed a numerical limitation on flow in its certification. *Jefferson County II* is irrelevant here because the state's certification condition was not a narrative criterion (e.g. "no toxic pollutants in toxic substance in a toxic amount or concentration") but merely a reiteration of the statutory requirement that water quality standards not be violated. The state here has not developed a narrative criterion or placed a numerical limitation in its certification condition. There may be situations in which criteria cannot be reduced to numerical limits in permits. This is not such a case. FOR advocates a numerical limit, but one it, not the state, seeks to impose. Where numerical limits can be developed they must be to meet the objective of providing the permittee in the specific and certain limits, rather than guessing what it is supposed to do.